Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ohio Supreme Court can create novel evidentiary requirements that are contrary to its prior precedent to defeat the defense of federal pre-emption under the Federal Railroad Safety Act of 1970 and 23 C.F.R. § 646.214, when federal courts in the state and elsewhere have found pre-emption on similar evidence?

2. Whether the Ohio Supreme Court erred in holding, in conflict with the federal statute and regulations, with this Court's precedents, and with the United States Court of Appeals for the Tenth Circuit, that the trigger for pre-emption is the disbursement of federal funds, rather than the participation of federal funds in the installation of warning devices at railway-highway crossings?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the Petitioner and Respondent listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that it is a wholly owned subsidiary of the Wheeling Corporation. Petitioner further states that no publicly traded company owns ten percent or more of the stock of the Wheeling Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wheeling & Lake Erie Railway Company ("W&LE") respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court was entered on May 22, 2002, Pet. App. 1a-16a, and is published at 767 N.E.2d 707 (Ohio 2002). The order denying the motion for reconsideration was entered on July 3, 2002, and is reported at 770 N.E.2d 1050 (Ohio 2002). Pet. App. 38a. The order of the Court of Appeals for the Fifth Appellate District reversing the trial court judgment for Respondent was entered on November 6, 2000, and is not reported. Pet. App. 17a-26a. It is available at 2000 Ohio App. LEXIS 5173 (Ohio Ct. App. Nov. 6, 2000).

JURISDICTION

The opinion and final judgment of the Ohio Supreme Court were entered on May 22, 2002. The Ohio Supreme Court denied W&LE's petition for rehearing on July 3, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).[1]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in Pet. App. 39a-44a. The regulations at

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[1] The judgment on liability and damages is final. The district court has stayed execution of the judgment and deferred determinations of interest owing on the judgment pending disposition of this petition by this Court. Pet. App. 34a-37a.

issue in this case are 23 C.F.R. §§ 646.214 and 646.216; they are reprinted in Pet. App. 45a-53a.[2]

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), this Court elucidated the standards for federal pre-emption of state tort law claims alleging that a railroad failed to install adequate warning devices at railway-highway crossings. This Court held that pre-emption is mandated by the Federal Railroad Safety Act of 1970 ("FRSA") for any project where federal-aid funds participate in the installation of warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352-54; see also 23 C.F.R. § 646.214(b)(3) & (4).

This case presents two issues that are critical to judicial enforcement of FRSA pre-emption under *Easterwood* and *Shanklin*. First, the Ohio Supreme Court sought to avoid the result mandated in *Easterwood* and *Shanklin* by applying a heightened evidentiary standard for pre-emption claims that is contrary to settled evidentiary principles of general application in Ohio state courts. In fact, in the two years since this Court's ruling in *Shanklin*, this is the third state supreme court to impose strict and unwarranted evidentiary requirements to preclude a defense of federal pre-emption under the FRSA and 23 C.F.R. § 646.214. Additionally, for the second time, a state supreme court has declared inadequate the very same kind of evidence that federal courts in its jurisdiction have accepted as establishing a pre-emption defense, thus inviting forum shopping and destroying the uniformity that was one of the purposes of the FRSA.

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[2] The regulations are reproduced from the 2001 edition of the Code of Federal Regulations. The regulations have not changed substantively since the time of the accident.

Second, the Ohio Supreme Court misconstrued the legal standard for pre-emption, and its holding conflicts with the plain meaning of the federal regulation, this Court's decision in *Shanklin*, and decisions of the United States Court of Appeals for the Tenth Circuit. The pre-emptive regulation is applicable to "any project where Federal-aid funds participate in the installation of the [warning] devices" at a crossing, 23 C.F.R. § 646.214(b)(3). Accordingly, this Court (and the Tenth Circuit) have held that pre-emption occurs "[w]hen the FHWA [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds" (*i.e.*, when the State commences work that is reimbursable with federal funds under federal regulations). *Shanklin*, 529 U.S. at 357; *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996). The Ohio Supreme Court disregarded this test and relied on a pre-*Shanklin* Ohio case to require evidence of actual disbursement of federal funds, Pet. App. 10a, creating the bizarre and unworkable rule that pre-emption of state tort law governing the *selection* of warning devices depends on proof of events occurring *after* the installation has already occurred. The Ohio Supreme Court's decision creates an untenable conflict with federal courts of appeals and places an impermissible burden on the assertion of a federal defense. Given the national importance of uniform rail safety rules, this Court should grant certiorari to address the conflict of authority and the risk of unseemly forum shopping that result from the Ohio court's disregard for this Court's precedent.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings has long been a matter of federal concern.[3] From the inception of

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[3] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. & Highway Admins., U.S. Dep't of

the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress authorized federal funds for States to use in protecting those crossings. Indeed, from as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e). The allocation of funds for such projects reflects the FHWA's determination that they are generally of no ascertainable net benefit to the railroad. 23 C.F.R. § 646.210.[4]

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[5] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[6] The purpose of the

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Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[4] The regulation is based on the concept that the advent of the motor vehicle is primarily responsible for the grade crossing accident problem: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Ry. Trains & Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[5] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[6] The FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive

FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 347. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

In 1972, the Secretary of Transportation submitted a statutorily-mandated study of the grade crossing problem.[7] He reported that "the current division of responsibility and authority among the private and public interests involved at the State and local level result[ed] in a fragmented approach to grade crossing safety," and he called for new "national coordination of [the] issue." *1972 Crossings Report* at 34. The Secretary recommended that Congress focus its funding efforts on installing protective devices rather than eliminating grade crossings altogether. *Id.* at 91. Although active

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provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[7] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for transmittal to Congress a comprehensive study of the problem of eliminating and protecting grade crossings, together with recommendations for appropriate action. 45 U.S.C. § 433 (repealed 1994).

warning systems were not warranted at most crossings,[8] the Secretary underscored the universal importance of passive warnings by recommending that "each railroad and each public agency which does not now have a program for passive device improvement should undertake one immediately." *Id.* at 92. Observing that crossing dangers were not limited to the traditional federal-aid highway system, the Secretary called for expansion of federal funding to all public roads. *Id.* at iii, 14, 92. Finally, the Secretary recommended that the FHWA administer assistance at the federal level, but that the "State highway departments, in cooperation with political subdivisions," have primary responsibility for developing programs for crossing safety. *Id.* at 92.

In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[9] This statute specifically grants federal funds to States "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). The regulatory scheme is known as the Section 130 Crossing Program.

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[8] "Active warning devices" include automatic gates and flashing lights that are activated by the approach of a train. "Passive warning devices" are devices such as signs and pavement markings that do not change when a train approaches. 23 C.F.R. § 646.204. The costs of active devices at each crossing were reported to range (in 1972 dollars) from $17,000 to $30,000 for installation, and $800 to $1,400 for annual maintenance. *1972 Crossings Report* at 77.

[9] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

This federal approach to crossing safety has been a resounding success. While both highway and rail traffic have increased, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: from 12,000 accidents and 1,500 fatalities at railway crossings in 1972 to 3,502 accidents and 425 fatalities in 2000. U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 2000*, at 4 tbl.1-1 (2001).

The Section 130 program was implemented through regulations promulgated by the FHWA.[10] These regulations govern state programs for evaluating railway crossing hazards and developing remedial projects. See 23 C.F.R. pt. 924. The FHWA also made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666. Among those specific regulations is a rule prescribing what will constitute "[a]dequate warning devices" where "[f]ederal-aid funds participate in the installation of the devices" at rail-highway crossings. 23 C.F.R. § 646.214(b)(3). Specifically, 23 C.F.R. § 646.214(b)(3) lists the attributes present at the crossing that require the installation of automatic gates and flashers. For those crossings that do not have the characteristics listed in (b)(3), the type of warning device to be installed is "subject to the approval of FHWA." *Id.* § 646.214(b)(4). These regulations are at the heart of this case.

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court held that the federal regulations defining "[a]dequate warning

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[10] The Secretary delegated his statutory power to administer the Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

devices" in 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670.

This Court accordingly formulated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671 (emphasis added). Simply stated, "when [§ 646.214(b)(3) and (4)] are applicable, state tort law is pre-empted." *Id.* at 670. The *Easterwood* Court found no pre-emption in that case because the regulations did not apply. No federal funds had "participated" in the installation of warning devices since the plan for upgrading a crossing was "shelved and the funds allocated for use in another project." *Id.* at 672.

In *Shanklin*, this Court reaffirmed the *Easterwood* rule, and held that pre-emption occurs whenever the federal warning-device regulation is applicable, even where passive devices (such as crossbucks) are installed without any specific determination by the FHWA or the State that the devices were "adequate" for that particular crossing under the applicable regulatory standard. 529 U.S. at 355-57.

> When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be

> installed and the means by which railroads are to participate in their selection." *Easterwood*, *supra*, at 671. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to [federal] standard[s] . . . that pre-empts state tort actions.

Id. at 357.

C. Statement Of Facts

This case arises out of a July 1996 collision between a motorcycle and a W&LE freight train. W&LE is a small rail company operating principally in Pennsylvania and Ohio. The accident occurred when Respondent failed to stop his motorcycle before a railroad crossing at Howe Road, in Brimfield Township, Ohio. Still moving at about thirty miles per hour at the point of collision, Respondent struck the side of a slow-moving locomotive that was traveling at 26 miles per hour as it was exiting the crossing. Respondent sustained injuries resulting in, among other things, amputation of his leg. The crossing was marked by a crossbuck sign, a passive warning device that was installed on October 12, 1995, as part of the Ohio Buckeye Crossbuck Program.

Respondent sued the railroad, alleging that the railroad was negligent for, among other things, failing to install active warning devices at the crossing. W&LE moved for partial summary judgment on the ground that the warning device claim was pre-empted by federal law. It supported its claim with an affidavit by Bruce Brown, a Roadmaster for W&LE, stating that prior to the accident, the crossbuck sign at the Howe Road crossing was installed with federal funds as part of Ohio's "Buckeye Crossbuck Program," a federally funded grade crossing program. He attached to his affidavit an agreement between the Ohio Department of Transportation and W&LE, in which W&LE agreed to replace its crossbuck signs with new signs as part of the Buckeye Crossbuck Program. The agreement provided that the reimbursement

money would come from federal funds. The court denied the motion, finding that W&LE had failed to prove that the crossbuck was installed pursuant to a federally funded plan. Pet App. 32a. The court did, however, grant leave to W&LE to file an additional motion for partial summary judgment.

In its new motion for summary judgment on the warning device claim, W&LE attached an affidavit by Susan Kirkland, Manager of Grade Crossing Safety Programs of the Ohio Rail Development Commission. Kirkland testified that she had personal knowledge (1) that the Buckeye Crossbuck Program received 100% federal funding; (2) that ODOT executed an agreement with the FHWA, and Kirkland was involved in the planning process with the FHWA; (3) that ODOT had a contract with W&LE to implement the Buckeye Crossbuck Program at its crossings, which Kirkland helped draft; (4) that Kirkland reviewed the crossbucks plans, set up the funds, and processed the bills for grade crossing projects; and (5) that Kirkland was aware of W&LE's execution of its agreement to install the devices. Kirkland Aff. at 1; Kirkland Dep. at 34, 30, 26, 33, 12-13; Ex. 1 to Kirkland Aff. at 9. Respondent did not raise an issue of fact with regard to any of these activities but argued that federal funding alone was insufficient to establish pre-emption, and that Kirkland lacked personal knowledge of the payment of federal funds. The court (ruling before this Court's *Shanklin* decision) agreed with Respondent that federal funding alone did not trigger pre-emption, and held that pre-emption would occur only if the FHWA had actually determined that the devices were adequate at that particular crossing. Pet. App. 30a; see also *id.* at 27a. The trial court did not expressly discuss the sufficiency of Kirkland's testimony, but it had denied Respondent's motion to strike her affidavit for lack of personal knowledge.

The case proceeded to a jury trial. A divided jury found that Respondent and W&LE were equally negligent in causing the accident and returned a verdict for Respondent. It awarded $1,664,200 in compensatory damages to

Respondent, but the trial court reduced the verdict to $832,100 to account for Respondent's contributory negligence.

On appeal, a unanimous Court of Appeals of Ohio, Fifth Appellate District, reversed the judgment of the trial court. Finding that Kirkland's affidavit and deposition on personal knowledge established federal funding for the Howe Road signs, it held that under this Court's decision in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), federal law pre-empted the state law negligence claim in this case relating to inadequate warning devices at railway crossings. The court of appeals also determined, based on a jury response to an interrogatory, that the jury's verdict against W&LE was based solely on the inadequate warning device claim. It therefore vacated Respondent's award and entered judgment in favor of W&LE. Pet. App. 26a. Respondent appealed to the Ohio Supreme Court.

D. Decision Of The Ohio Supreme Court

The Ohio Supreme Court reversed the judgment of the court of appeals on May 22, 2002, in a 4-3 decision and reinstated the judgment of the trial court on the verdict of the jury. It held that "W&LE failed to prove that federal funds *paid* for the installation of the Howe Road crossbuck sign," Pet. App. 11a (emphasis added). The court relied on its own pre-*Shanklin* decision in *Carpenter* v. *Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994), which required that "federal funds must actually have been *committed and spent*" in order for pre-emption to occur. *Id.* at 263, 631 N.E.2d at 610, *quoted in* Pet. App. 10a (emphasis added). Despite Kirkland's uncontradicted testimony that she had personal knowledge of federal funding of the crossbucks installation, the Ohio Supreme Court decided that she lacked personal knowledge of federal funding because she did not work for ODOT, the agency "responsible for handling federal funds." Pet. App. 10a. In fact, as the dissent pointed out, *id.* at 14a (Kline, J., dissenting), the record showed that Kirkland

was a manager of the crossing safety programs at the Ohio Rail Development Commission, which is an independent agency within the Ohio Department of Transportation ("ODOT").[11] Kirkland Dep. at 6. The Ohio Supreme Court further pointed out that "W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project or to show that there was an agreement executed by the federal government indicating that it would pay for the project," even though it acknowledged that Kirkland testified to the existence of such a contract. Pet. App. 11a n.10. The dissent pointed out that the majority's decision was contrary to Ohio precedent on the personal knowledge requirement as well as to the evidence of record. *Id.* at 15a (Kline, J., dissenting).

W&LE filed a timely motion for reconsideration on the ground that the Ohio Supreme Court's pre-emption analysis conflicted with this Court's decision in *Shanklin*. On July 3, 2002, the Ohio Supreme Court denied the petition without comment.

REASONS FOR GRANTING THE PETITION

I. STATE COURT IMPOSITION OF SPECIAL EVIDENTIARY REQUIREMENTS TO ESTABLISH THE FEDERAL DEFENSE OF *SHANKLIN* PRE-EMPTION IS A MATTER OF NATIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW.

In the two years since this Court's decision in *Shanklin*, state courts have developed strict and unwarranted evidentiary requirements under state law that frustrate the assertion of valid federal pre-emption defenses under the FRSA, rejecting evidence that federal courts (even in the

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[11] *See* Ohio Rev. Code § 4981.02(A).

same state) have found sufficient. This Court has frequently intervened to prevent local rules of practice from defeating the valid assertion of a federal right. Such intervention is particularly critical here given the FRSA's mandate of national uniformity in railroad safety laws.

In rejecting W&LE's federal pre-emption defense, the Ohio Supreme Court dismissed uncontradicted testimony, supported by documentation, establishing that federal funds were used to install a warning device at the Howe Road crossing. Specifically, the Ohio court allowed a state negligence claim despite an uncontradicted affidavit from the Manager of Grade Crossing Safety Programs in Ohio that the crossing in question was part of a federally funded "Buckeye Crossbuck Program," which she helped to implement. There was no evidence controverting her assertions, and indeed, there was no dispute that the crossing was part of the Buckeye Crossbuck Program, which received 100% federal funding.

The Ohio Supreme Court nevertheless decided that the affiant had not demonstrated "personal knowledge" of the payment of federal funds, which it conflated with "participation" of federal funds in the installation of warning devices. In allowing the negligence claim in the face of this evidence of pre-emption, the Ohio court ignored without comment its own rule that an affiant's and a deponent's uncontroverted assertion of personal knowledge satisfies the evidentiary requirements for summary judgment. See *State ex rel. Corrigan* v. *Seminatore*, 66 Ohio St. 2d 459, 467, 423 N.E.2d 105, 111 (1981). In order to challenge an assertion of personal knowledge under Ohio law, there has to be evidence that the affiant did not in fact know the matters asserted. *Id.* In this case, the plaintiff would have had to present evidence that Kirkland did not know the crossing was federally funded. Plaintiff did not present such evidence, and indeed the deposition established Kirkland's personal knowledge of federal funding. The plaintiff instead asserted that Kirkland did not personally handle the federal funds.

In addition, as the dissent pointed out, Pet. App. 15a (Kline, J., dissenting), under prior Ohio law, Kirkland's job duties alone (as Manager of Grade Crossing Safety Programs) would constitute personal knowledge even if she had not helped to draft the agreement between ODOT and W&LE. See *Dublin City Sch. Dist. Bd. of Educ.* v. *Franklin County Bd. of Revision*, 80 Ohio St. 3d 450, 453, 687 N.E.2d 422, 424 (1997) (per curiam) (finding a witness's job duties to support an inference of personal knowledge about the strategy of purchase price allocation, even though he did not directly negotiate the sale); *Akron-Canton Waste Oil, Inc.* v. *Safety-Kleen Oil Servs., Inc.*, 81 Ohio App. 3d 591, 597, 611 N.E.2d 955, 959-60 (1992) (finding a secretary's job duties sufficient to establish her personal knowledge about the intention of her corporate employer). The evidence in this case, as a matter of law, more than sufficed to establish federal pre-emption. Therefore, under *Shanklin*, state tort law was pre-empted. *Shanklin*, 529 U.S. at 359.

The Ohio Supreme Court's special evidentiary requirement for federal pre-emption vitiates the rule established by this Court in *Easterwood* and *Shanklin* and thus undermines the FRSA policy of uniform railroad safety rules. To accomplish the FRSA's goal of uniformity in rail safety laws, Congress decided that States could only "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. When pre-emption is not enforced, then state law will govern subjects that the Secretary has already covered in the regulations, in direct contradiction with the terms of the statute. To ignore the law of pre-emption is to promote competing state regulation of railroad safety and undermine the efficacy of the scheme that Congress and the FHWA have established.

There is in fact a troubling national pattern emerging as state courts impose unwarranted evidentiary requirements to

defeat *Shanklin* pre-emption. In *Kansas City Southern Railway* v. *Johnson*, 798 So. 2d 374, 379 (Miss.), *cert. denied*, 122 S. Ct. 43 (2001), the Mississippi Supreme Court denied pre-emption because federal funding was proven only by an affidavit of a state highway official and not by documentary evidence, even though the Fifth Circuit had previously upheld pre-emption based on the testimony of the same official, see *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), and even though the Mississippi Supreme Court had upheld summary judgment based on uncontradicted affidavits in other cases arising under state law, see, *e.g.*, *Magee* v. *Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186-87 (Miss. 1989). In *Duncan* v. *Kansas City Southern Railway*, 773 So. 2d 673, 680 (La. 2000), *cert. denied*, 532 U.S. 992 (2001), the Louisiana Supreme Court denied pre-emption because of the lack of "unequivocal" evidence that a device was installed with federal funds.

The Ohio Supreme Court's decision, like those of the Mississippi and Louisiana courts, is at odds with numerous federal courts that have concluded that similar affidavits, accompanied by similar documentation, are sufficient to establish that federal funds were used to install warning devices at relevant rail-highway crossings. See, *e.g.*, *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903 (8th Cir. 1998); *Hester*, 61 F.3d at 386; *Cochran* v. *CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000); *Williams* v. *CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996), *aff'd without opinion*, 139 F.3d 899 (5th Cir. 1998); *McDaniel* v. *Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995).

Even more significantly, the Ohio court's ruling promotes forum shopping because the federal courts in Ohio recognize the federal pre-emption defense on the basis of evidence similar to that presented in this case. In fact, a federal court

in Ohio found that an affidavit by the very same witness, Susan Kirkland, stating that she had personal knowledge of federal funding of the very same Buckeye Crossbuck Program, was sufficient to establish pre-emption. See *Flood* v. *CSX Transp., Inc.*, No. C-2-99-1186, slip op. at 7 (S.D. Ohio July 12, 2001) (finding pre-emption based on the "uncontroverted affidavit of Susan J. Kirkland," who stated that the crossbucks were installed with federal funds as part of the Buckeye program); Pet. App. 60a. These conflicting federal and state decisions subject railroads to varying duties even within the same state and apply pre-emption unevenly along the same rail corridors. Although the FRSA mandates national uniformity, 49 U.S.C. § 20106, there is now intolerable chaos among the courts with respect to the rules for establishing pre-emption.

This Court has never hesitated to intercede when unreasonably strict rules of local practice "defeat[] a plain assertion of a federal right," even if that rule would be applicable to rights asserted under state law. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (rejecting a state court rule that an appearance waived a railroad's venue defense under a federal law); *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) (holding that state law rules of burden of proof could not be applied to "narrow[] the protection that the defendant had secured" under a federal law limiting railroad liability). In *Brown* v. *Western Railway of Alabama*, 338 U.S. 294 (1950), this Court held that "a federal right cannot be defeated by the forms of local practice" and that "[s]hould this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved." *Id.* at 296, 299. *Brown* concerned a claim for damages under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* The defendant filed a demurrer on the ground that the complaint did not set forth a cause of action. The Georgia courts agreed,

stating that the presence in a rail yard of a large clinker, on which plaintiff injured himself, could not be construed as an act of negligence by the defendant railroad in light of a state court rule of construction that required pleading allegations to be construed most strongly against the pleader. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts," and it reversed the state court. 338 U.S. at 295, 299. "'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers,'" declared this Court, "'the assertion of federal rights, when plainly and reasonably made is not to be defeated under the name of local practice.'" *Id.* at 299 (quoting *Davis*, 263 U.S. at 24).

It is difficult to draw any conclusion other than that the Ohio Supreme Court decision reflects hostility to *Shanklin* pre-emption of state tort law remedies for plaintiffs. This case did not meet the Ohio Supreme Court's standards for discretionary appeals; the pedestrian issue of evidentiary sufficiency that had been decided by the court of appeals is not "a question of public or great general interest." Ohio Sup. Ct. R. II.1(A)(3). Moreover, as the dissent made clear, the majority below reached its conclusion only by disregarding state precedent on the requirements for "personal knowledge" under state summary judgment law, Pet. App. 15a (Kline, J., dissenting), and a more than century-old rule against the reweighing of evidence by an appellate court, see, *e.g.*, *McLaughlin* v. *Wheeling & Lake Erie Railway*, 61 Ohio St. 279, 281-82, 55 N.E. 825, 826 (1899). Most significantly, it is a patent repudiation of this Court's precedents for a state court to rule that the State's Manager of Grade Crossing Safety Programs – who testified that the Buckeye Crossbuck Program for installing crossbucks at this and other crossings was 100% federally funded, and who had direct involvement in both the drafting and implementation of ODOT's project agreement with the FHWA and W&LE's contract to install

the devices – lacked personal knowledge that "Federal-aid funds participate[d] in the installation of the devices" at the Howe Road crossing, 23 C.F.R. § 646.214(b)(3), simply because she did not personally witness any disbursement of federal funds to the state for this project. Neither the Respondent nor the court below can dispute in good faith that the Buckeye Crossbuck Program and the Howe Road crossbuck are federally funded and that state tort law at the crossing is pre-empted. The court below has simply twisted an evidentiary rule to erect a false procedural obstacle to defeat assertion of a federal pre-emption defense.

This Court has been particularly vigilant to prevent the imposition or application of state court rules that place special burdens on the assertion of federal rights. It is well established that "[a] state may not discriminate against rights arising under federal laws," *McKnett* v. *St. Louis & San Francisco Railway*, 292 U.S. 230, 234 (1934), for the Supremacy Clause of the United States Constitution expressly states that the United States Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990) (refusing to permit state courts to create special defenses applicable solely to a federal cause of action); *Testa* v. *Katt*, 330 U.S. 386, 394 (1947) (reversing a state court decision refusing to exercise jurisdiction over a cause of action under a federal act where the cause of action was within the scope of the state court's authority). These principles are equally applicable to the defense of federal pre-emption – which is itself a means of enforcing the Supremacy Clause. *Mondou* v.

New York, New Haven, & Hartford Ry., 223 U.S. 1, 54-55 (1912). This Court cannot tolerate the uniquely stringent application by state courts of facially neutral evidentiary rules to defeat a defense established by federal law, as the Ohio Supreme Court and other state courts have done.

This case presents questions that are significant not only in the area of railway safety regulation, an area in which national uniformity is mandated by federal statute, 49 U.S.C. § 20106, but also in all other areas of federal pre-emption that require factual findings. This Court's intervention is critical to guard against state evasion of federal law and the resulting court-by-court variations in the application of federally created defenses.

II. THE OHIO SUPREME COURT'S PRE-EMPTION STANDARD CONFLICTS WITH THE PLAIN MEANING OF THE REGULATIONS AND DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The legal predicate of the Ohio Supreme Court's ruling – that *Easterwood/Shanklin* pre-emption requires evidence of the actual disbursement of federal funds – is contrary to the plain meaning of the regulations and in conflict with the decisions of this Court in *Shanklin* and of the United States Court of Appeals for the Tenth Circuit. In fact, the Ohio court did not even cite *Shanklin* to determine when federal law pre-empted state tort law, but instead relied on an Ohio case, *Carpenter* v. *Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994), which pre-dated *Shanklin*. *Carpenter* required that "federal funds must actually have been *committed and spent*" before pre-emption would occur. *Id.* at 263, 631 N.E.2d at 610 (emphasis added). In applying this rule without analysis of the regulations or the controlling federal case law, the Ohio Supreme Court erroneously required evidence of actual payment, rather than "participation" of federal funds, the standard prescribed by

federal law. See Pet. App. 11a n.10 ("[w]e also note that W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project").

Pre-emption occurs whenever the federal warning device regulations are "applicable," and by their plain terms the regulations are applicable to "any project where Federal-aid funds participate in the installation of the [warning] devices" at a crossing. 23 C.F.R. § 646.214(b)(3). "Participation" is not synonymous with final payment. Federal funds participate whenever reimbursable work is performed pursuant to an authorized federal-aid highway project (*i.e.*, one to which federal funds are committed by an executed project agreement between the FHWA and the State). The statute is explicit on this point: "[t]he execution of the project agreement [by the Secretary of Transportation] shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project." 23 U.S.C. § 106(a)(3).[12] As the FHWA has explained:

> An obligation is a commitment – the Federal government's promise to pay the States for the Federal share of a project's eligible cost. This commitment occurs when the project is approved and the project agreement is executed. Obligation is a key step in financing. *Obligated funds are considered "used" even though no cash is transferred.*

Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* 16 (1999) (emphasis added, footnote omitted). Courts have also recognized that federal funds are obligated as soon as the agreement is signed. See *Maine* v. *Goldschmidt*, 494 F. Supp. 93, 95 (D. Me. 1980); *Tennessee*

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[12] The prior version of 23 U.S.C. § 106 included almost the same words: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1990).

ex rel. Leech v. *Dole*, 567 F. Supp. 704, 711 (M.D. Tenn. 1983) ("Obligation is the key step because obligated funds are considered 'expended' even though no cash is transferred."), *rev'd on other grounds*, 749 F.2d 331 (6th Cir. 1984).

The federal regulations in 23 C.F.R. parts 140 and 646 underscore that the "participation" of federal funds has nothing to do with disbursement. Under the regulations, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); see also *id.* § 140.904(b). When any of that eligible work is in fact performed, federal funds participate in that work and in the costs incurred. See, *e.g.*, *id.* §§ 646.216(c)(3) (imposing limitations on railroad charges "[w]here Federal funds participate in the cost of replacement right-of-way . . ."), 646.216(b)(2) (describing conditions under which "Federal aid funds may participate in the amounts paid to engineering consultants"), 140.907(b) (rules for federal participation in overhead and indirect construction costs), 140.801 ("reimbursement criteria for Federal participation in project related audit expenses").

The Ohio Supreme Court's requirement that a railroad may prevail on a pre-emption defense only if it can prove actual disbursement of federal funds for specific devices (by documentary evidence or testimony of a witness with personal knowledge of payment)[13] ignores not only the plain language

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[13] The Ohio Supreme Court's determination that Kirkland lacked personal knowledge of disbursement stems from a misunderstanding, advanced by Respondent, of the reimbursement process for federally funded projects. Respondent emphasized that Kirkland did not "mak[e] deposits of federal funds," Kirkland Dep. at 13 ll. 15-16, and for that reason argued that she lacked personal knowledge about payment. The Ohio Supreme Court agreed that Kirkland lacked personal knowledge, which it defined as knowledge "'perceived through one or more of the

of the regulation but also this Court's test for pre-emption. As this Court has held, "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the *participation of federal funds*." *Shanklin*, 529 U.S. at 357 (second emphasis added); see also *Easterwood*, 507 U.S. at 671. This Court properly understood that pre-emption occurs when the State commences work on the installation of the devices after FHWA approval:

> *When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds*, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state and tort law addressing the same subject. *At that point*, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection." *Easterwood*, *supra*, at 671. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to [federal] standard[s] . . . that pre-empts state tort actions.

Shanklin, 529 U.S. at 357 (emphasis added).

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senses of the witness.'" Pet. App. 10a. However, the federal government does not cut checks and send them to state employees for "deposit." Rather, the standard practice is for the United States Treasury Department to make an electronic fund transfer to the state's bank account for the federal share of a highway project's cost. *Financing Federal-Aid Highways*, *supra*, at 18. This occurs after the railroad is reimbursed by the state, and the state then submits vouchers to the FHWA, which approves them and transmits them to the Treasury Department. *Id.*; 23 C.F.R. § 140.922. It is not surprising, then, that Kirkland testified that she did not have direct personal knowledge of the receipt and transfer of federal funds. *See* Kirkland Dep. at 14-15; Pet. App. 10a. Indeed, it is apparent that no one involved in the use of federal funds would have had the type of "personal knowledge" of deposit required by the Ohio court because the funds are instead transferred by the Treasury Department. In any event, the actual disbursement of federal funds to the State is irrelevant to pre-emption, as discussed *supra* at 19-21.

Thus, pre-emption under *Shanklin* requires proof of the participation of federal funds in device installation, not proof that federal funds were actually disbursed to pay for a device at a particular crossing. Susan Kirkland testified without contradiction that the FHWA approved the Buckeye program, that W&LE executed a contract with the State to install the Buckeye crossbucks at its crossings, including Howe Road, and that she knew these things from her direct participation in the administration of the program and the drafting of one of the agreements that was based on federal funding.

The Ohio Supreme Court's erroneous focus on actual payment, rather than on the required "participation" of federal funds, also places it in direct conflict with the United States Court of Appeals for the Tenth Circuit, which properly interprets the federal "participation" standard and specifically finds pre-emption to occur before federal funds have reimbursed the final installation of the safety devices. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (finding pre-emption at the beginning of a project when the Secretary of Transportation agreed to provide 90% of the funds for the crossbucks); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 561 (10th Cir. 1995) (finding pre-emption when federal funds were committed to preliminary engineering on a grade crossing improvement project, six years before final federal payment for the project).

The pre-emption standard employed by the Ohio Supreme Court is also illogical and unworkable. First, it makes no sense to hold that a federal regulation governing the *selection* of warning devices only has pre-emptive force when the project is complete and federal funds have been disbursed.[14]

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[14] Absent arrangements for progress payments, disbursement of federal funds occurs after completion of the project. When the project has been completed and inspected, the railroad (or other contractor) that performs the installation submits a final bill to the State. "The final billing should include certification that the work is complete, acceptable, and in accordance with the terms of the agreement." Federal Highway Admin.,

Second, there is no reason that the testimony of a disinterested state official in charge of federal crossing programs cannot suffice to establish the participation of federal funds in a project in which she was directly involved. Documentation of federal funding of crossing devices is often incomplete or unavailable, especially when accidents occur years after installation. The important federal policy of pre-emption cannot depend on the vagaries of recordkeeping practices at state highway agencies or regional FHWA offices. This Court should resolve the conflict of authority with *Shanklin* and the Tenth Circuit on the nature of federal funds "participation" that must be proven, and reject the standard adopted below that is at war with any rational scheme for judicial enforcement of FRSA pre-emption.

* * * *

This Court is the final guardian of federal law. It cannot allow a state court to impose state-law evidentiary requirements that are patently unjustified under prior precedents to defeat the valid assertion of a federal defense of pre-emption. Moreover, in order to make that evidentiary ruling, the Ohio Supreme Court invoked its own pre-*Shanklin* precedent to define a legal standard for pre-emption that directly conflicts with the rule of *Shanklin* and the Tenth Circuit, as well as the plain meaning of the federal statute and regulations. The ruling below undermines the national uniformity that Congress ordered in the FRSA, and represents an unwarranted evasion of *Shanklin* pre-emption that only this Court can correct. This Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 189 (2d ed. 1986). The railroad is reimbursed by the State, and the State in turn seeks reimbursement from the federal government. *See* 23 C.F.R. § 140.904(a).

Respectfully submitted,

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September 4, 2002

APPENDICES

APPENDIX A

SUPREME COURT OF OHIO

No. 2000-2278

BONACORSI,

Appellant,

v.

WHEELING & LAKE ERIE RAILWAY COMPANY,

Appellee.

Submitted Jan. 29, 2002.
Decided May 22, 2002.

DOUGLAS, J.

{¶ 1} In July 1996, plaintiff-appellant, Cris A. Bonacorsi, was seriously injured[1] when the motorcycle he was driving collided with the engine of a freight train at a railroad crossing on Howe Road in Brimfield Township, Ohio. The train was owned and operated by defendant-appellee, Wheeling & Lake Erie Railway Company ("W&LE").

{¶ 2} At the time of the accident, signs were posted along Howe Road warning westbound motorists, such as Bonacorsi, of the upcoming crossing. Posted approximately eight hundred fifty feet before the crossing was a round, yellow sign with a large black X flanked by two Rs. Next, about seven hundred feet from the crossing, the pavement was painted with a large white X flanked by two Rs. Three hundred feet before the crossing, the pavement marking was

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[1] Among other injuries, Bonacorsi's left leg was amputated at the hip, his pelvis was fractured, and one of his lungs collapsed.

repeated. Immediately before the crossing were a red triangular "yield" sign and a white, X-shaped sign with the words "RAILROAD CROSSING" written in black ("cross-buck sign"). The signs and pavement markings described above are classified as "passive warning devices" because they indicate the presence of a crossing but they do not change in any respect when a train is approaching. Section 646.204, Title 23, C.F.R. In contrast, "active warning devices" are traffic control devices activated by the approach of a train, such as flashing light signals and automatic gates that warn motorists that a train is approaching the crossing. Id.

{¶ 3} On the day of the accident Bonacorsi was aware that he was approaching a crossing, but because there were no active warning devices at the crossing and because foliage growing near the railroad right-of-way blocked his view, he was unaware that a train was also approaching the crossing[2] As Bonacorsi neared the tracks his line of sight became less obstructed by the foliage and he was able to see the approaching train, but he was travelling too fast to avoid a collision.

{¶ 4} Bonacorsi subsequently filed a claim against W&LE alleging that the accident was caused by W&LE's negligence "in failing to install active warning devices, failing to eliminate view obstructions caused by the foliage surrounding its crossing, failing to operate the train in a safe and lawful manner, including maintaining a proper lookout and

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[2] Archie Burnham, a professional engineer specializing in traffic safety, testified that at the time of the accident when a westbound motorist was three hundred forty feet from the crossing, foliage obstructed the motorist's view of all but twenty-eight feet of the railroad tracks north of the crossing. He further testified that, taking into account the posted speed limit of Howe Road (forty miles per hour) and the train speed limit (twenty-five miles per hour), published safety guidelines provide that at three hundred forty feet from the crossing, westbound motorists should be able to see at least two hundred sixty feet of the track north of the crossing in order to stop their vehicles in reaction to seeing a train.

maintaining control over the train so that it could avoid a collision, and by failing to properly sound the train's horn and bell."[3]

{¶ 5} W&LE moved for partial summary judgment asserting that Bonacorsi's claim that the warning devices were inadequate was preempted by federal law. In this regard, W&LE asserted that federal funds paid for the installation of the crossbuck sign posted on Howe Road and that warning devices installed using federal funds are adequate as a matter of federal law.[4] Thus, W&LE argued, the subject of warning-

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[3] Bonacorsi further alleged that because W&LE was aware of prior accidents at this crossing, its conduct in failing to install active devices and/or failing to eliminate the sight obstruction at this crossing constituted willful and wanton misconduct and illustrated a conscious disregard for the rights and safety of others. Thus, Bonacorsi argued that he was entitled to punitive as well as compensatory damages. The trial court refused to submit the punitive damages claim to the jury

[4] {¶ a} Section 646.214(b), Title 23, C.F.R. provides:

{¶ b} "(3)(i) 'Adequate warning devices' * * * on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

{¶ c} "(A) Multiple main line railroad tracks.

{¶ d} "(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

{¶ e} "(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

{¶ f} "(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

{¶ g} "(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

{¶ h} "(F) A diagnostic team recommends them.

device adequacy with regard to the Howe Road signs has been covered, thereby triggering the preemption provision of Section 20106, Title 49, U.S.Code.[5]

{¶ 6} As proof that federal funds were used to install the Howe Road crossbuck sign, W&LE submitted an affidavit executed by Bruce Brown, an employee of W&LE, stating that prior to the accident the crossbuck sign at the Howe Road crossing was installed with federal funds as part of Ohio's Buckeye Crossbuck Program. Attached as an exhibit to Brown's affidavit was a pamphlet created by the Ohio Department of Transportation ("ODOT"), titled "Ohio's Buckeye Crossbuck Program." The pamphlet described an experimental program designed to determine the effectiveness of a newly designed crossbuck sign. According to the pamphlet, the program required that crossbuck signs at all passive crossings in Ohio be replaced with new crossbuck signs.[6]

{¶ i} "(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA [Federal Highway Administration] may find that the above requirements are not applicable.

{¶ j} "(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

[5] {¶ a} Section 20106, Title 49, U.S.Code provides:

{¶ b} "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement."

{¶ c} Although the preemption provision contains an exception, it is inapplicable in this case.

[6] According to ODOT's pamphlet, there were more than three thousand seven hundred passive crossings in Ohio when the Buckeye Crossbuck Program began. The program required that crossbuck signs at one-half of the passive crossings, selected at random, were to be replaced with

{¶ 7} Also attached to Brown's affidavit was an agreement between ODOT and W&LE, wherein W&LE agreed to replace existing crossbuck signs at all of its passive crossings in Ohio by the end of 1993 as part of the Buckeye Crossbuck Program. ODOT agreed to supply the new crossbuck signs and to reimburse W&LE for its installation costs. The agreement indicated that the reimbursement money would come from federal funds.

{¶ 8} In his brief opposing W&LE's motion, Bonacorsi attacked the sufficiency of Brown's supporting affidavit, arguing that the affidavit was not based on Brown's personal knowledge that federal funds were spent on the installation of the crossbuck sign at the Howe Road crossing. See Civ.R. 56(E), which requires that affidavits in support of motions for summary judgment be made on "personal knowledge." In addition, Bonacorsi argued that even if W&LE could prove that federal funds had been used to install the crossbuck sign, that fact alone would not be sufficient to trigger preemption. Bonacorsi argued that W&LE was also required to show that the Federal Highway Administration ("FHWA") had approved the installation.

{¶ 9} W&LE replied that proof of federal funding was sufficient, in and of itself, to trigger preemption because when federal funds are used to install warning devices at a railroad crossing it is presumed that the devices meet FHWA approval and thus meet the federal standards of adequacy.

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the newly designed Buckeye crossbuck signs (described as a "highly reflectorized red and white" crossbuck sign) and the other half with standard black-and-white crossbuck signs that had been "upgraded" with reflective tape on all four sides of the post. The Howe Road crossing fell into the latter category, i.e., the crossbuck sign installed at the Howe Road crossing was the upgraded standard crossbuck sign. Once the new signs were in place, ODOT planned to study accident statistics and human behavior at the crossings to compare the effectiveness of both types of signs.

{¶ 10} The trial court agreed with Bonacorsi and found that W&LE had failed to prove that federal funds were used to install the crossbuck sign. In addition, the trial court rejected W&LE's assertion that federal funding of sign installation was, in and of itself, sufficient to trigger preemp tion of an inadequate-signalization claim, and held that proof of FHWA approval was also required in this case. Accordingly, the court denied W&LE's motion for partial summary judgment.

{¶ 11} Thereafter, W&LE, with leave of court, filed an additional motion for partial summary judgment, again arguing that Bonacorsi's inadequate-warning-device claim was preempted. Attached to the motion was an affidavit executed by Susan Kirkland, an employee of the Ohio Rail Development Commission.[7] In her affidavit, Kirkland stated that the crossbuck signs installed at all passive crossings in Ohio, including W&LE crossings, were installed with federal funds as part of the Buckeye Crossbuck Program.

{¶ 12} In his response to W&LE's motion, Bonacorsi argued that Kirkland, like Brown, did not have personal knowledge of the statements made in her affidavit regarding federal funding of the installation of the Howe Road crossbuck sign. In support of his assertion, Bonacorsi referred to Kirkland's deposition testimony in which Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge of federal funding of sign installation at railroad crossings came from other people. In addition to his argument that Kirkland lacked the personal knowledge required by Civ.R. 56(E), Bonacorsi renewed his assertion that proof of federal funding alone was insufficient to preempt a state-law claim of inadequate warning devices.

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[7] The Ohio Rail Development Commission was created by R.C. 4981.02(A).

{¶ 13} The court agreed with Bonacorsi that federal funding alone was not sufficient to trigger preemption and, consequently, denied W&LE's motion. The court did not discuss whether Kirkland's affidavit was sufficient to establish that federal funds were used to install the Howe Road crossbuck sign.

{¶ 14} W&LE subsequently moved to vacate the court's denial of its motion for partial summary judgment.[8] The court again reviewed W&LE's additional motion for partial summary judgment, and again denied it. The court stated, "While federal funds may have been used in the purchase and/or installation of the * * * crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administration approved the * * * crossbuck signs as being adequate to protect motorist safety at such crossing."

{¶ 15} Thereafter, the matter proceeded to a jury trial. The jury found for Bonacorsi, but further found that both Bonacorsi and W&LE were negligent and determined that each party's negligence contributed equally to causing the accident. In response to a written jury interrogatory labeled "One-A" that asked, "If you find that [W&LE] was negligent, in what respect(s) do you so find?" the jury responded in writing, "Two prior accidents; railroad did not initiate change in signals and signs. Proving ordinary care. Plaintiff unable to see the train."

{¶ 16} The jury determined that Bonacorsi's compensatory damages were $1,664,200. Reducing the verdict by fifty percent to account for Bonacorsi's contributory negligence, the trial court entered judgment in favor of Bonacorsi in the amount of $832,100.

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[8] W&LE's motion to vacate alleged that the order denying its motion for partial summary judgment was invalid because Judge Sinclair issued the order after Judge Lile had been assigned to preside over the matter

{¶ 17} W&LE appealed raising numerous assignments of error.[9] The assignment relevant to this appeal asserted that the trial court erred in denying W&LE's motion for partial summary judgment.

{¶ 18} The court of appeals, upon de novo review of W&LE's motion for partial summary judgment, found that Kirkland's affidavit established that federal funds had been used to pay for installation of the Howe Road crossbuck sign. In addition, the court held that proof of federal funding was, in and of itself, sufficient to trigger preemption of Bonacorsi's inadequate-warning-device claim. In support of its holding the court cited *Norfolk S. Ry. Co. v. Shanklin* (2000), 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374, which was decided while this case was pending in the court of appeals. Consequently, the court of appeals reversed the trial court's denial of W&LE's motion for summary judgment on Bonacorsi's inadequate-warning-device claim.

{¶ 19} Moreover, the court found that the jury's response to Interrogatory One-A clearly revealed that the jury's verdict against W&LE was based solely on Bonacorsi's inadequate-warning-device claim. Accordingly, the court reversed the jury's verdict, vacated Bonacorsi's award, and entered judgment in favor of W&LE.

{¶ 20} The cause is before this court upon our allowance of a discretionary appeal.

{¶ 21} There are two issues before the court in this case. The first issue is whether the court of appeals erred in reversing the trial court's denial of W&LE's motion for partial summary judgment. Only if we find that the reversal was proper do we reach the second issue in this case, which is whether the court of appeals erred in interpreting the jury's

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[9] Bonacorsi cross-appealed with regard to the trial court's failure to submit the issue of punitive damages to the jury. See footnote 3.

response to Interrogatory One-A to mean that the jury found W&LE negligent only with regard to Bonacorsi's inadequate-signalization claim.

{¶ 22} With regard to the first issue, Bonacorsi claims that the court of appeals erred in two respects. First, he argues that the court erred in finding that Kirkland's affidavit proved that federal funds paid for the installation of the Howe Road crossbuck sign. In this respect, Bonacorsi renews the argument he made to the trial court and the court of appeals, i.e., that Kirkland lacked personal knowledge of the statements made in her affidavit.

{¶ 23} Second, Bonacorsi argues that the court of appeals erred in applying the holding in *Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374, to this case. In this regard, Bonacorsi asserts that *Shanklin* applies only when federal funds are applied toward railroad crossing *improvement* programs and not when applied toward *experimental* programs such as the program under which the crossbuck sign at the Howe Road crossing was installed. Consequently, Bonacorsi argues, even if the court finds that Kirkland's affidavit does prove federal funding, his inadequate-signalization claim was not preempted because the federal regulation regarding sign adequacy, interpreted by the court in *Shanklin*, did not apply to the program responsible for installing the Howe Road crossbuck sign.

{¶ 24} Our review of summary judgment rulings is de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. Accordingly, we apply the same standard as the trial court and court of appeals in this case. Civ.R. 56(C) provides that summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 25} We first review Kirkland's affidavit to determine whether it establishes that federal funds paid for the installation of the Howe Road crossbuck sign. Proof of federal funding is crucial to W&LE's preemption argument because the federal regulation that covers the subject of warning-device adequacy applies only to warning devices installed with federal funds. Section 646.214(b)(3)(i), Title 23, C.F.R. (see footnote 4); *Carpenter v. Consol. Rail Corp.* (1994), 69 Ohio St.3d 259, 263, 631 N.E.2d 607 ("Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent").

{¶ 26} Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223, 631 N.E.2d 150. For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. Id.; Evid.R. 602. "Personal knowledge" is "[k]nowledge gained through first-hand observation or experience, as distinguished from a belief based on what someone else has said." Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.").

{¶ 27} Kirkland explicitly states in her affidavit that she had "personal knowledge" that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge that federal funds were used to install signs at railroad crossings came from other people.

{¶ 28} After reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ.R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign.[10] Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted.

{¶ 29} Our holding renders moot Bonacorsi's second argument with regard to W&LE's motion for partial summary judgment, i.e., his assertion that *Shanklin* does not apply to this case. In addition, we do not reach the second issue in this case, which was dependent on a finding that partial summary judgment was proper.

{¶ 30} For the foregoing reasons, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court and the verdict of the jury.

Judgment reversed.

RESNICK, FRANCIS E. SWEENEY, SR. and PFEIFER, JJ., concur.

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[10] We also note that W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project or to show that there was an agreement executed by the federal government indicating that it would pay for the project. A federal statute that was in effect at the time this project was allegedly funded required the Secretary of the United States Department of Transportation to enter into a formal project agreement with state transportation departments concerning projects that were to receive federal funding under Title 23, U.S.Code. Former Section 110, Title 23, U.S.Code, 72 Stat. 894. Although Kirkland testified in her deposition that there was an executed agreement between the state of Ohio and the FHWA regarding the project, and W&LE, in its brief submitted to this court, refers to a contract between the FHWA and the state of Ohio, no such agreement is contained in the record.

MOYER, C.J., KLINE and LUNDBERG STRATTON, JJ., dissent.

ROGER L. KLINE, J., of the Fourth Appellate District, sitting for COOK, J.

ROGER L. KLINE, J., dissenting.

{¶ 31} I respectfully dissent. In my view, the trial court and the court of appeals did not err when they considered Susan Kirkland's affidavit as admissible evidence because W&LE presented sufficient evidence to establish that the affidavit met the Civ.R. 56(E) "personal knowledge" requirement. Kirkland's description of her job duties allowed an inference that she would be in a position to know if federal funds were used to install the crossbuck signs at the Howe Road crossing.

{¶ 32} I agree with the majority that a court ruling on a motion for summary judgment first must determine what evidence is admissible before it may construe that evidence in the opposing party's favor. Civ.R. 56(E). I further agree that the "personal knowledge" requirement set forth in Civ.R. 56(E) is the same standard contained in Evid.R. 602 for a lay witness testifying at trial. The trial court has discretion in determining whether evidence is admissible. See, e.g., *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 616, 687 N.E.2d 735.

{¶ 33} 1 McCormick on Evidence (5th Ed.1992) 40, Section 10, addresses the personal knowledge requirement by commenting:

{¶ 34} "A person who has no knowledge of a fact except what another has told him does not, of course, satisfy the requirement of knowledge from observation. When the witness, however, bases his testimony partly upon firsthand knowledge and partly upon the accounts of others, the problem is one which calls for a practical compromise. As a case in point, when a witness speaks of his own age or his

kinship with a relative, the courts allow the testimony. * * * In short, when the witness testifies to facts that he knows partly at first hand and partly from reports, the judge should admit or exclude according to the overall reliability of the evidence." (Footnotes omitted.)

{¶ 35} In *Akron-Canton Waste Oil. Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 611 N.E.2d 955, the court of appeals upheld the trial court's admission of the testimony of a secretary for the purpose of showing the intention of her corporate employer. The secretary had contact with the managers and the corporate employees and, essentially, ran the office. Her bosses disclosed their intentions to her when they gave her instructions to perform the operations of the company. The court concluded that she had based her testimony on personal knowledge. "Her description of her job duties also allowed an inference that she would be in a position to know the reasons for the various practices of the corporation." Id. at 597, 611 N.E.2d 955.

{¶ 36} The above McCormick quotation and the holding in *Akron-Canton Waste Oil* led this court in *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 450, 687 N.E.2d 422, to interpret the personal knowledge requirement contained in Evid.R. 602 and find that a trial court may admit testimony based partly on firsthand knowledge and partly upon the accounts of others. This court found that a witness who had personal knowledge of a taxpayer's purchase of twelve parcels of property and a taxpayer's strategy in assigning an artificially high purchase price to one parcel could testify for the purpose of showing that this allocation did not reflect the true value of the parcel in question. The witness's job allowed him access to the following information:

{¶ 37} "[H]e attended and participated in corporate management meetings at which the sale and the strategy for allocating the purchase price were discussed. He oversaw

'property taxes, insurance, financial reporting, corporate, federal and state income tax filings, among other things.' His duties included administering the purchased properties. The [Board of Tax Appeals] could infer that he collaborated in devising the allocation strategy and could find that he incorporated the allocation decision in his reporting and filing duties." Id. at 453, 687 N.E.2d 422.

{¶ 38} In this case, the majority summarizes Kirkland's disposition testimony as revealing that "ODOT was responsible for handling federal funds, that [Kirkland] did not work for ODOT, and that her knowledge that federal funds were used to install signs at railroad crossings came from other people." However, a closer examination of Kirkland's deposition reveals that she testified as follows: As a manager of the safety programs at the Ohio Rail Development Commission, Kirkland was one of many people responsible for carrying out the Buckeye Crossbuck Program. The Public Utilities Commission of Ohio ("PUCO") designed the crossbuck program and sent a directive to Kirkland's employer to implement it. As manager of the safety section, she was responsible for setting up the funds, reviewing the plans, and processing the bills for the crossbuck program. She attended meetings and helped set up the parameters and the procedures of the program. She helped draft an agreement between ODOT and W&LE in which ODOT agreed to supply all new crossbuck signs at passive crossings and to reimburse W&LE from federal funds for its installation costs.

{¶ 39} Kirkland also testified that she helped draft an agreement with the FHWA involving the administration of the crossbuck program. She and her staff had to follow the directives of the FHWA when they carried out the crossbuck program. The agreement provided that the federal funds for the signs and program would flow from the federal government to the state of Ohio by routing the funds from FHWA to ODOT. Kirkland's staff was involved in the payments made for the standard crossbuck signs at the Howe

Road crossing. However, she stated that her knowledge that federal funds were used to install the crossbuck signs at the Howe Road crossing was based on what others told her. While administering the crossbuck program, her employer (the Ohio Rail Development Commission) was within ODOT and was called the Rail Division.[11] The ODOT Rail Division distributed an educational brochure for the Buckeye Crossbuck Program.

{¶ 40} Kirkland's deposition testimony reveals that her job allowed her access to information regarding the crossbuck program similar to that possessed by the witness in *Dublin Bd. of Edn.*, 80 Ohio St.3d 450, 687 N.E.2d 422. As manager of the safety section, she set up the funds, processed the bills, and reviewed the plans of the program. She attended meetings where the parameters and procedures were established, helped draft agreements involving ODOT, W&LE, and FHWA that included funding, and followed the directives of FHWA to carry out the program. Her description of her job duties allowed the trial court to infer that she would be in a position to know whether federal funds paid for the installation of the crossbuck signs at the Howe Road crossing. Therefore, Kirkland had personal knowledge to state in her affidavit that federal funds were used to install crossbuck signs at all passive crossings in Ohio. Consequently, the trial court did not abuse its discretion in considering this affidavit,[12] and the court of appeals did not err in finding that Kirkland had personal knowledge.

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[11] At the time of her deposition, Kirkland and her attorney stated that her employer is affiliated with ODOT but is legally not a division of ODOT. The Ohio legislature "created the Ohio [R]ail [D]evelopment [C]ommission, as an independent agency of the state within [ODOT]." R.C. 4981.02(A). The director of ODOT is an ex officio member of the commission. Id.

[12] The trial court implicitly found that Kirkland had personal knowledge when it overruled Bonacorsi's motion to strike the affidavit.

{¶ 41} I would affirm the court of appeals' judgment on the "personal knowledge" issue and address the other issues in this appeal.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing dissenting opinion.

However, the trial court never found that W&LE had established that federal funds were used to install the crossbuck sign at the Howe Road crossing. Instead, it denied the partial motion for summary judgment on another ground. Thus, the court of appeals had authority to review the "personal knowledge" issue but did not have the authority to find that federal funds were used to install the sign in question because it did not have anything from the trial court to review. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138; see, also, *Fulmer v. Insura Prop. & Cas. Co.* (2002), 94 Ohio St.3d 85, 99-100, 760 N.E.2d 392 (Cook, J., dissenting); *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384.

APPENDIX B

COURT OF APPEALS OF OHIO
FIFTH DISTRICT
STARK COUNTY

No. 1999CA0047

CRIS A. BONACORSI,
Plaintiff-Appellee,

v.

WHEELING AND LAKE ERIE RAILWAY CO.,
Defendant-Appellant.

Nov. 6, 2000.

Civil Appeal From Stark County
Court of Common Pleas Case.

GWIN, P.J., HOFFMAN, J., and READER, V.J.

OPINION

READER.

Judgment reversed.

Defendant-Appellant/Cross-Appellee Wheeling & Lake Erie Railway Company (hereinafter "appellant") appeals from the February 25, 1999, May 7, 1999, June 29, 1999, August 16, 1999, and December 2, 1999, Judgment Entries of the Stark County Court of Common Pleas. Plaintiff-Appellee/Cross-Appellant Cris A. Bonacorsi (hereinafter "appellee") appeals from the September 3, 1999, Judgment Entry of such court.

STATEMENT OF THE FACTS AND CASE

On July 13, 1996, appellee Cris Bonacorsi was injured when the motorcycle he was driving struck the front wheels of a freight train owned by appellant Wheeling & Lake Erie Railway Company. The incident occurred at the Howe Road railroad crossing in Brimfield Township, Ohio. As a result of the collision, appellee suffered severe injuries including an amputated left leg, a collapsed lung, a pelvic fracture and a lacerated left arm. Thereafter, on July 10, 1998, appellee filed a complaint against appellant in the Stark County Court of Common Pleas. Appellee, in his complaint, alleged that appellant was negligent "in failing to install active warning devices, in failing to eliminate view obstructions caused by the foliage surrounding its crossing, failing to operate the train in a safe and lawful manner, including maintaining a proper lookout and maintaining control over the train so that it could avoid a collision, and by failing to properly sound the train's horn and bell." Appellee, who also alleged that appellant's conduct constituted willful and wanton misconduct, sought punitive damages in addition to compensatory damages. An answer was filed by appellant on August 10, 1998. Two Motions for Summary Judgment were filed by appellant on January 25, 1999. Appellant, in one of the motions, argued that it was entitled to judgment as a matter of law based on appellee's negligence and willful and wanton misconduct. In its second Motion for Summary Judgment, appellant argued that it was entitled to summary judgment on appellee's claim of inadequate signalization since such claim was preempted by federal law. A brief in opposition to both motions was filed by appellee on February 8, 1999. On February 19, 1999, appellant filed a separate Motion for Partial Summary Judgment on appellee's punitive damage claim. Four days later, appellant filed a reply brief in support of its January 25, 1999, Motions for Summary Judgment. Pursuant to a Judgment Entry filed on February 25, 1999, the trial court overruled appellant's Motion for

Summary Judgment on the issue of appellee's negligence and wanton and willful misconduct, finding that there were genuine issues of fact. As memorialized in a separate Judgment Entry filed the same day, the trial court also overruled appellant's Motion for Summary Judgment on this issue of inadequate signalization. In overruling such motion, the trial court stated that appellant had failed to establish that the crossbuck at the Howe Road railroad crossing was installed pursuant to a federally funded plan and that appellant had failed to establish that "the program [involving the installation of warning devices] had the approval of the FHWA [Federal Highway Administration] as a Federal Aid Project." Subsequently, on March 1, 1999, appellee filed a brief in opposition to appellant's Motion for Summary Judgment on the issue of punitive damages. Pursuant to a Judgment Entry filed on March 4, 1999, the trial court overruled such motion. With leave of court, appellant, on March 23, 1999, filed a second Motion for Summary Judgment on appellee's claim of inadequate signalization. Once again, appellant argued that such claim was preempted by federal law. In support of its motion, appellant submitted an affidavit signed by Susan Kirkland, the Manager of Grade Crossing Safety Programs, including the Ohio Buckeye Crossbuck Program, for the Ohio Rail Development Commission. Kirkland, in her affidavit, stated in part, as follows: 2. The Ohio Buckeye Crossbuck Program is a statewide research project providing for the evaluation of the Buckeye Crossbuck through the installation of both modified crossbuck signs and Buckeye Crossbuck signs at all Ohio passive public grade crossings, including Wheeling & Lake Erie Railway passive grade crossings. 3. The Ohio Buckeye Crossbuck Program was a federally-funded plan. The modified standard crossbuck signs and Buckeye Crossbuck signs that were installed by the Wheeling & Lake Erie Railway under the Ohio Buckeye Crossbuck Program were installed with federal money. 4. As explained in the

Agreement between the Ohio Department of Transportation and the Wheeling & Lake Erie Railway Company, attached as "Exhibit 1", the Ohio Buckeye Crossbuck Program was a Federal-aid project and the construction was financed with one hundred percent (100%) federal funds . . . 6. The Ohio Buckeye Crossbuck Program was approved by the Federal Highway Administration as a Federal-aid project.

Appellee later filed a Motion to Strike Paragraphs 3, 4, and 6 of Susan Kirkland's affidavit, arguing that Kirkland lacked personal knowledge of the conclusions made in such paragraphs. While the trial court declined to grant such motion, the trial court, as memorialized in a Judgment Entry filed on May 7, 1999, again overruled appellant's second Motion for Summary Judgment on the issue of inadequate signage. The trial court specifically held that "Kirkland's broad statement that the program 'was approved by the Federal Highway Administration as a Federal-aid project' does not establish that the program had the Secretary's specific approval of a warning system." After appellant filed a motion requesting, in part, that the May 7, 1999, Judgment Entry overruling appellant's second Motion for Summary Judgment be vacated, the trial court, pursuant to a Judgment Entry filed on June 29, 1999, overruled such motion. The trial court, in its June 29, 1999, entry, held that the principle of federal preemption was not applicable since "[w]hile federal funds may have been used in the purchase and/or installation of the Buckeye crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administration approved the Buckeye crossbuck signs as being adequate to protect motorist safety at such crossing." Subsequently, a jury trial commenced in this matter on July 6, 1999. On July 14, 1999, the jury returned with a verdict in favor of appellee and against appellant and awarded appellee damages in the amount of $1,664,200.00. The jury, in Interrogatory One-A, indicated that it found appellant negligent in the following respects: "Two prior accidents; railroad did not initiate

change in signals and signs. Proving ordinary care. Plaintiff unable to see the train." The jury, in its responses to the Interrogatories, further found that appellant and appellee were each 50% negligent and that their negligence was the proximate cause of appellee's injury. A Judgment Entry awarding appellee judgment against appellant in the amount of $832,100.00 was later entered by the trial court. Two weeks after the jury's verdict, appellee filed a motion for a new trial on the issue of punitive damages and a motion requesting prejudgment interest. On August 23, 1999, appellant filed a Motion for Judgment Notwithstanding the Verdict and a Motion for a New Trial. Subsequently, the trial court, pursuant to a Judgment Entry and Order filed on September 3, 1999, overruled appellee's Motion for a New Trial on the issue of punitive damages. In addition, after reviewing appellant's Motions for a new Trial and for Judgment Notwithstanding the Verdict, the briefs in opposition to the same and appellant's reply briefs, the trial court, pursuant to a Judgment Entry filed on December 2, 1999, overruled both motions. Following a hearing on appellee's Motion for Prejudgment Interest, the trial court, as memorialized in a Judgment Entry filed on December 2, 1999, awarded prejudgment interest to appellee in the amount of $302,100.00. In a Judgment Entry filed on December 28, 1999, the trial court corrected its December 2, 1999, entry to state that prejudgment interest would be calculated at the rate of 10% per year from July 13, 1996, the date of the accident. Appellant, in its briefs before this Court, now raises the following assignments of error:

> I THE TRIAL COURT ERRED IN FAILING TO GRANT WHEELING'S SUMMARY JUDGMENT MOTION ON PLAINTIFF'S INADEQUATE SIGNALIZATION CLAIM AND IN SUBMITTING THAT ISSUE TO THE JURY WHEN THAT THE [SIC] CLAIM WAS PRE-EMPTED BY FEDERAL LAW.

II THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

III THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE ISSUE OF PLAINTIFF'S RECKLESSNESS TO THE JURY.

IV THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE RAILROAD'S DUTY TO INSTALL EXTRA-STATUTORY WARNINGS AT ITS CROSSINGS WAS ONE OF "ORDINARY CARE," RATHER THAN ONE APPLYING ONLY TO EXTRA HAZARDOUS CROSSINGS.

V THE TRIAL COURT ERRED IN CHARGING THE JURY ON CLAIMS THAT WERE UNSUPPORTED BY THE EVIDENCE AND ON ALLEGED DUTIES THAT THE DEFENDANT DID NOT OWE.

VI THE TRIAL COURT ERRED IN ITS RULINGS ON THE ADMISSION OF EVIDENCE.

VII THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST.

Appellee, in turn, raises the following assignment of error in his cross- appeal:

THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO SUBMIT THE ISSUES OF WILLFUL AND WANTON MISCONDUCT AND PUNITIVE DAMAGES TO THE JURY.

I

Appellant, in its first assignment of error, argues that the trial court erred in failing to grant appellant's Motion for Summary Judgment on appellee's inadequate signalization

claim. We agree. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) states in pertinent part: Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1966), 75 Ohio St.3d 280. It is based upon this standard we review appellant's first assignment of error. As is stated above, appellant filed a total of three separate motions arguing that appellee's inadequate signalization

claim was preempted by federal law. The trial court, in its February 25, 1999 Judgment Entry denying appellant's first Motion for Summary Judgment on such issue, held that appellant had failed to establish that the crossbuck at the Howe Road crossing was installed pursuant to a federally funded plan and that the program had the approval of the FHWA. Appellant, with leave of court, later filed a second Motion for Summary Judgment on the pre-emption issue. In support of such motion, appellant attached Susan Kirkland's affidavit in which she stated, based on her personal knowledge, that the Ohio Buckeye Crossbuck Program was a federal aid project that was financed with federal funds. However, the trial court once again denied appellant's Motion for Summary Judgment, stating in its May 7, 1999, Judgment Entry, in part, as follows: "After due consideration and in light of *Gollihue v. Consolidated Rail Corporation* (1997),120 Ohio App.3d 378, the court finds that there remain genuine issues of material fact which preclude summary judgment. Kirkland's broad statement that the program "was approved by the Federal Highway Administration as a Federal-aid project," does not establish that the program had the Secretary's specific approval of a warning system. The *Gollihue* court cited *Shots v. CSX Transp.* (C.A.7, 1994), 38 F.3d 304, summarizing that "the Secretary of transportation's approval of a state railroad agreement to install reflectorized crossbucks with federal funds was not a determination that these devices would adequately protect every crossing covered by the agreement."

Finally, in its June 29, 1999, Judgment Entry, the trial court noted that while federal funds may have been used with respect to the Buckeye crossbuck signs at the Howe Road crossing, there was no evidence that the FHWA had approved such signs. Because of the conflict among federal Courts of Appeals as to whether the FRSA [Federal Railroad Safety Act], by virtue of 23 CFR Sections 646.214(b)(3) and (4) (1999), preempts state law tort claims concerning a railroad's

failure to maintain adequate warning devices at crossings where federal funds were used in the installation of the devices, the United States Supreme Court granted certiorari in *Norfolk Southern Railway Co. v. Shanklin* (1999), 120 S.Ct. 370, to resolve such issue. Pursuant to an Opinion issued on April 17, 2000, in *Norfolk Southern Railway Co. v. Shanklin* (2000), 120 S.Ct. 1467, the United States Supreme Court resolved the conflict among the federal courts and held that the FHWA regulations addressed the adequacy of warning devices installed using federal funds and, therefore, pre-empt state law actions. In so holding, the United States Supreme Court stated as follows: Sections 646.214(b)(3) and (4) therefore establish a standard of adequacy that 'determine(s) the devices to be installed' when federal funds participate in the crossing improvement project. (Citation omitted) If a crossing presents those conditions in (b)(3), the State must install automatic gates and flashing lights; if the (b)(3) factors are absent, (b)(4) dictates that the decision as to what devices to install is subject to FHWA approval. . . .

As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displaces(s) state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. (Citation omitted.) *Shanklin*, 120 S.Ct. at 1474.

Sections 646.214(b)(3) and (4) 'cover the subject matter' of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts respondent's state court claim that the advance warning signs and reflectorized crossbucks . . . were inadequate. *Shanklin*, 120 S.Ct. at 1477.

While the Supreme Court recognized that nothing prohibited a State from using its own or additional federal funds to install more protective devices at railroad crossings,

it clearly stated that "[w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices". *Id.* at 1476. As established by the affidavit of Susan Kirkland, which was based on her personal knowledge as Manager of Grade Crossing Safety Program for the Ohio Rail Development Commission, federal funds were used to pay for the signs installed at the Howe Road crossing. Since the signs at the Howe Road crossing were installed with federal funds, pursuant to *Shanklin*, supra., appellee's inadequate signal-ization claims and in the case sub judice were pre-empted by federal law. Appellant's first assignment of error is, therefore, sustained. Numerous other assignments of error have been raised in this matter both by appellant and appellee. However, as is stated above, the jury, in Interrogatory One-A, indicated that it found appellant negligent in the following respects: "Two prior accidents; railroad did not initiate change in signals & signs. Proving ordinary care. Plaintiff unable to see train." Clearly, as evidenced by the above language, the judgment against appellant was based solely on appellee's inadequate signalization claim.

For such reason, based on this Court's disposition with respect to appellant's first assignment of error, the remaining assignments of error in this matter are moot. Accordingly, for the foregoing reasons, the judgment of the Stark County Court of Common Pleas is reversed and final judgment is entered in favor of appellant.

READER, V.J., GWIN, P.J., and HOFFMAN, J., concurs.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Jun 29, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

vs.

WHEELING AND LAKE ERIE RAILWAY CO., *et al.*,

Defendants.

JUDGMENT ENTRY

Judge Lile

This civil action came on for further consideration of the motion filed by the Defendant, Wheeling and Lake Erie Railway Co. regarding dismissal of this action due to preemption under federal law, and the motion filed by Plaintiff to exclude testimony of Patrolman Aaron Anweiler regarding the radar readout of the Plaintiffs's speed prior to the collision which is the subject of this lawsuit. Hearing was held on June 3, 1999, at which time the parties were present, or were represented by counsel.

Being advised in the premises, the Court does not find that the principle of federal preemption applies in this case. While federal funds may have been used in the purchase and/or installation of the Buckeye crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administation approved the Buckeye crossbuck signs as being adequate to protect motorist safety at such crossing. Therefore, there is no basis for dismissal of this action, as requested by the defendant railroad.

For the reason that there is no evidence that the radar unit being used by patrolman Anweiler on Howe Road, Brimfield Township, on July 13, 1996, was calibrated, the Court will not permit the introduction of the radar readout displayed on the unit at the time that the Plaintiff's motorcycle was approaching Anweiler's police cruiser. However, other evidence of the Plaintiff's speed just prior to the collision, including opinion, accident reconstruction if noticed in discovery, and audio monitor, may be introduced.

It is Ordered.

/s/ Roger G. Lile
Judge Roger G. Lile

cc: Robert F. Linton, Jr. Esq.
Philip Howes, Esq./Kimberly Wyss, Esq.

APPENDIX D

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed May 7, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

vs

WHEELING & LAKE ERIE RAILWAY COMPANY, *et al,*

Defendants.

JUDGMENT ENTRY

Judge Sinclair

This matter is before the court on the additional motion for summary judgment filed by the Defendant, Wheeling & Lake Erie Railway Company ("W&LE"). Plaintiff filed a brief in opposition.

Defendant attached the affidavit of Susan Kirkland ("Kirkland"), Manager of Grade Crossing Safety Programs with the Ohio Rail Development Commission. As outlined in Kirkland's affidavit, the railroads were given an extension on the deadline for installing signs due to litigation over the contract for the manufacture of the Buckeye Crossbuck signs. Her affidavit also states that "the Ohio Buckeye Crossbuck Program was a Federal aid project and the construction was financed with one hundred (100%) federal funds." Finally, Kirkland's affidavit states that the program "was approved by the Federal Highway Administration as a Federal-aid project." Defendant requests summary judgment on the issue of preemption based on these statements.

After due consideration and in light of *Gollihue v. Consolidated Rail Corporation* (1997), 120 Ohio App.3d 378, the court finds that there remain genuine issues of material fact which preclude summary judgment. Kirkland's broad statement that the program "was approved by the Federal Highway Administration as a Federal-aid project," does not establish that the program had the Secretary's specific approval of a warning system. The *Gollihue* court cited *Shots v. CSX Transp.* (C.A. 7, 1994), 38 F.3d 304, summarizing that "the Secretary of Transportation's approval of a state railroad agreement to install reflectorized crossbucks with federal funds was not a determination that these devices would adequately protect every crossing covered by the agreement."

Under Ohio common law, railroads have a duty to use ordinary care to protect motorists from and warn them of trains occupying or approaching a highway crossing. *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210. The measures a railroad must take to meet the duty is a question of fact, and they may include extra-statutory forms of warning. *Id.*

-In light of the foregoing, Defendant's additional motion for summary judgement is herein DENIED.

IT IS SO ORDERED.

/s/ [illegible]
Judge Lee Sinclair

cc: Robert F. Linton, Jr., Esq.
Philip Howes, Esq. /Kimberly Wyss, Esq. (Vogelsang)

APPENDIX E

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Feb 25, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

VS

WHEELING & LAKE ERIE RAILWAY COMPANY, *et al,*

Defendants.

JUDGMENT ENTRY

Judge Sinclair

This cause came on to be heard on the motion for partial summary judgment filed by Defendant Wheeling and Lake Erie Railway Company ("W&LE") on the Plaintiff's claim of inadequate signalization. Plaintiff filed a brief in opposition. Construing the pleadings, depositions, affidavits, and briefs of counsel most strongly in favor of the nonmoving party, the court finds that there remain genuine issues of fact and the Defendant is not entitled to summary judgment as a matter of law.

W&LE submits that the duty on which the allegation of wrongdoing is based has been preempted by federal law. In support of its claim that the Federal Railroad Administration ("FRA") and the Federal Highway Administration ("FHWA") in cooperation with ODOT and PUCO, selected and paid for the traffic control devices installed at the crossing, W&LE attached the affidavit of its road master, Bruce E. Brown, and Agreement No. 7294 between ODOT and W&LE.

Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent, and the warning devices, as defined by applicable federal regulations, must have been installed. *Carpenter v. Consolidated Rail Corporation* (1994), 69 Ohio St.3d 259, citing *CSX Tranportation, Inc. v. Easterwood* (1993), 507 U.S. 658.

W&LE has failed to establish that the crossbuck at the subject railroad crossing were installed pursuant to a federally funded plan. Brown's affdavit states that said crossbucks were installed on October 12, 1995. Section IV of the Agreement states:

> "The PROJECT work specified herein shall be completed by December 31, 1993, unless completion of such PROJECT work is prevented by a force majeure occurrence."

Further, the crossbuck could have been paid by funds other than Federal Aid Highway Safety funds as evidenced by Section VII of the Agreement which provides, in pertinent part:

> ". . . STATE will obtain the monies for such installation from Surface Transportation Program (STP) and/or Federal Aid Highway Safety funds, as provided by the Federal Aid Highway Safety Act of 1973 and the Intermodal Surface Transportation Efficiency Act of 1991."

W&LE has also failed to establish the program had the approval of the FHWA as a Federal Aid Project. *Gollihue, et al v. Consolidated Rail Corporation* (1997), 120 Ohio App.3d 378.

Under Ohio common law, railroads have a duty to use ordinary care to protect motorists from and warn them of trains occupying or approaching a highway crossing.

Matkovich v. Penn Cent. Transp. Co. (1982), 69 Ohio St.2d 210. The measures a railroad must take to meet the duty is a question of fact, and they may include extra-statutory forms of warning. *Id.*

In light of the foregoing, Defendant Wheeling and Lake Erie Railway Company's motion for partial summary judgment on the claim of inadequate signalization is hereby OVERRULED.

IT IS SO ORDERED.

/s/ [illegible]
Judge Lee Sinclair

cc: Robert F. Linton, Jr. Esq.
Philip Howes, Esq. /Kimberly Wyss, Esq. (Vogelsang)

APPENDIX F

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Aug 05, 2002]

Case No. 1998-CV-01311

CRIS A. BONACORSI,
Plaintiff(s),

-VS-

WHEELING & LAKE ERIE RR,
Defendant(s).

JUDGMENT ENTRY GRANTING STAY OF EXECUTION AND RESTRAINING ORDER

Judge Lee Sinclair

Defendant, Wheeling & Lake Erie Railway Co., having moved this Court for a stay of execution of the judgment of the trial court, and the Court finding the motion to be well taken, it is hereby

ORDERED that the enforcement or execution of the judgment of the trial court in this matter be and hereby is stayed pending final determination of the request for a writ of certiorari to the U.S. Supreme Court and any action by the U.S. Supreme Court on that request. The stay of execution shall be effective immediately and shall remain in effect until the termination of proceedings in the U.S. Supreme Court. Security for this stay, unless further ordered, shall be in the form of a deposit of $1,470,000.00 by the defendant into a

security account with KeyBank bearing account number 354261006343. The security shall be held in that account until released by order of this Court.

It is further ORDERED that the parties, their counsel, representatives, employees, all those acting in concert with them, and all other persons or entities to whom actual notice of this order is given are restrained from withdrawing, depleting, releasing, paying or otherwise converting the security deposited in the above account unless and until further order of this Court.

It is further ORDERED that the restraining order of this Court, signed by this Court on July 22, 2002, is hereby dissolved.

/s/ [Illegible]
JUDGE LEE SINCLAIR

COPY TO: ROBERT LINTON, JR., ESQ.
STEVEN PAULSON, ESQ.
PHILIP HOWES, ESQ. (HOWES, GODSHALL)

NOTICE

TO THE CLERK OF COURTS:

Please see that a copy of the within entry is served on KeyBank at 126 Central Plaza, North, Canton, OH 44702, by personal service, by Order of the Court.

/s/ [Illegible]
JUDGE LEE SINCLAIR

THE COURT OF COMMON PLEAS
OF STARK COUNTY

[Filed Aug. 05, 2002]

JUDGE
LEE SINCLAIR

115 CENTRAL PLAZA NORTH
CANTON, OHIO 44702
(330) 451-7789
FAX (330) 451-7740
Email: Judge1@co.stark.oh.us

August 1, 2002

Philip Howes, Esq.
Howes, Godshall
400 Tusc. St., W., Ste. 200
Canton, OH 44701

And

Robert Linton, Esq.
1500 One Cascade Plaza
Akron, OH 44308

Re: Bonacorsi vs Wheeling & Lake Erie Railway Company
1998-CV-01311

Gentlemen:

Please find enclosed the Court's judgment entry in the above-captioned matter. The Court has revised the entry to provide the essence of what was requested by both sides. Please see that a copy of this order is served on the financial institution. Please note that the Court has also requested that the entry be served on the financial institution.

Sincerely,

/s/ [Illegible]
JUDGE LEE SINCLAIR

VS/pjm

Enclosure

Cc: Steven Paulson, Esq.

THE COURT OF COMMON PLEAS
OF STARK COUNTY

JUDGE
LEE SINCLAIR

115 CENTRAL PLAZA NORTH
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(330) 451-7789
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August 5, 2002

Philip Howes, Esq.
Howes, Godshall, Daane
400 Tusc. St., West, Ste. 200
Canton, OH 44702

And

Robert Linton, Jr., Esq.
Steven Paulson, Esq.
1500 One Cascade Plaza
Akron, OH 44308

Re: Bonacorsi v. Wheeling & Lake Erie
Case No. 1998-CV-01311

Gentlemen:

Please be advised that the Court has now issued the stay order forwarded to your offices last week. It would be my suggestion that, upon the conclusion of this matter in the United States Supreme Court, the parties immediately notify this Court. Upon notification, we will set the matter immediately before Judge Lile for a final determination as to any amount due including any issue of prejudgment and/or post judgment interest that may exist.

Sincerely,

Judge Lee Sinclair

VS/pjm

Cc: Judge Lile

APPENDIX G

THE SUPREME COURT OF OHIO

[Filed July 3, 2002]

Case No. 00-2278

CRIS A. BONACORSI,

Appellant,

v.

WHEELING AND LAKE ERIE RAILWAY CO.,

Appellee.

RECONSIDERATION ENTRY
(Stark County)

This cause came on for further consideration upon appellee's motion for reconsideration, and in the alternative, for remand and to stay the mandate; and appellant's motion to strike exhibits A, B and C attached to the motion for reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 1999CA000407)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX H

STATUTES

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings,

may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request

the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed

with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway [1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a

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[1] So in original. Probably should be "railroad-highway".

State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(July 5, 1994, Pub.L. 103-272, § 1(e), 108 Stat. 866.)

APPENDIX I

REGULATIONS

23 C.F.R. § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

23 C.F.R. § 646.216 General procedures.

(a) *General.* Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) *Preliminary engineering and engineering services.* (1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) *Rights-of-way.* (1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*) and applicable FHWA right-of-way procedures in 23 CFR, Chapter I, Subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 *et. seq.*

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facility and which are provided solely for the benefit of the railroad.

(iii) Actual salvage value of the material recovered from the facility being replaced. Total credits to a project shall not be required in excess of the replacement cost of the facility.

(3) Where Federal funds participate in the cost of replacement right-of-way, there will be no charge to the project for the railroad's existing right-of-way being transferred to the State highway agency except when the value of the right-of-way being taken exceeds the value of the replacement right-of-way.

(d) *State-railroad agreements.* (1) Where construction of a Federal-aid project requires use of railroad properties or adjustments to railroad facilities, there shall be an agreement in writing between the State highway agency and the railroad company.

(2) The written agreement between the State and the railroad shall, as a minimum include the following, where applicable:

(i) The provisions of this subpart and of 23 CFR, Part 140, subpart I, incorporated by reference.

(ii) A detailed statement of the work to be performed by each party.

(iii) Method of payment (either actual cost or lump sum),

(iv) For projects which are not for the elimination of hazards of railroad-highway crossings, the extent to which the railroad is obligated to move or adjust its facilities at its own expense,

(v) The railroad's share of the project cost,

(vi) An itemized estimate of the cost of the work to be performed by the railroad,

(vii) Method to be used for performing the work, either by railroad forces or by contract,

(viii) Maintenance responsibility,

(ix) Form, duration, and amounts of any needed insurance,

(x) Appropriate reference to or identification of plans and specifications,

(xi) Statements defining the conditions under which the railroad will provide or require protective services during performance of the work, the type of protective services and the method of reimbursement to the railroad, and

(xii) Provisions regarding inspection of any recovered materials.

(3) On work to be performed by the railroad with its own forces and where the State highway agency and railroad agree, subject to approval by FHWA, an agreement providing for a lump sum payment in lieu of later determination of actual costs may be used for any of the following:

(i) Installation or improvement of grade crossing warning devices and/or grade crossing surfaces, regardless of cost, or

(ii) Any other eligible work where the estimated cost to the State of the proposed railroad work does not exceed $100,000 or

(iii) Where FHWA finds that the circumstances are such that this method of developing costs would be in the best interest of the public.

(4) Where the lump sum method of payment is used, periodic reviews and analyses of the railroad's methods and cost data used to develop lump sum estimates will be made.

(5) Master agreements between a State and a railroad on an areawide or statewide basis may be used. These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects. Supporting data for each project or group of projects must, when combined with the master agreement by reference, satisfy the provisions of § 646.216(d)(2).

(6) Official orders issued by regulatory agencies will be accepted in lieu of State-railroad agreements only where, together with supplementary written understandings between the State and the railroad, they include the items required by § 646.216(d)(2).

(7) In extraordinary cases where FHWA finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds, provided satisfactory commitments have been made with respect to construction, maintenance and the railroad share of project costs.

(e) *Authorizations.* (1) The costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation. Preliminary engineering and right-of-way

acquisition costs which are otherwise eligible, but incurred by a railroad prior to authorization by the FHWA, although not reimbursable, may be included as part of the railroad share of project cost where such a share is required.

(2) Prior to issuance of authorization by FHWA either to advertise the physical construction for bids or to proceed with force account construction for railroad work or for other construction affected by railroad work, the following must be accomplished:

(i) The plans, specifications and estimates must be approved by FHWA.

(ii) A proposed agreement between the State and railroad must be found satisfactory by FHWA. Before Federal funds may be used to reimburse the State for railroad costs the executed agreement must be approved by FHWA. However, cost for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings prior to the approval of the executed State-Railroad Agreement in accordance with 23 CFR 140.922(a) and § 646.218 of this part.

(iii) Adequate provisions must be made for any needed easements, right-of-way, temporary crossings for construction purposes or other property interests.

(iv) The pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract.

(3) In unusual cases, pending compliance with § 646.216(e)(2)(ii), (iii) and (iv), authorization may be given by FHWA to advertise for bids for highway construction under conditions where a railroad grants a right-of-entry to its property as necessary to prosecute the physical construction.

(f) *Construction.* (1) Construction may be accomplished by:

(i) Railroad force account,

(ii) Contracting with the lowest qualified bidder based on appropriate solicitation,

(iii) Existing continuing contracts at reasonable costs, or

(iv) Contract without competitive bidding, for minor work, at reasonable costs.

(2) Reimbursement will not be made for any increased costs due to changes in plans:

(i) For the convenience of the contractor, or

(ii) Not approved by the State and FHWA.

(3) The State and FHWA shall be afforded a reasonable opportunity to inspect materials recovered by the railroad prior to disposal by sale or scrap. This requirement will be satisfied by the railroad giving written notice, or oral notice with prompt written confirmation, to the State of the time and place where the materials will be available for inspection. The giving of notice is the responsibility of the railroad, and it may be held accountable for full value of materials disposed of without notice.

(4) In addition to normal construction costs, the following construction costs are eligible for participation with Federal-aid funds when approved by the State and FHWA:

(i) The cost of maintaining temporary facilities of a railroad company required by and during the highway construction to the extent that such costs exceed the documented normal cost of maintaining the permanent facilities.

(ii) The cost of stage or extended construction involving grade corrections and/or slope stabilization for

permanent tracks of a railroad which are required to be relocated on new grade by the highway construction. Stage or extended construction will be approved by FHWA only when documentation submitted by the State establishes the proposed method of construction to be the only practical method and that the cost of the extended construction within the period specified is estimated to be less than the cost of any practicable alternate procedure.

(iii) The cost of restoring the company's service by adjustments of existing facilities away from the project site, in lieu of and not to exceed the cost of replacing, adjusting or relocating facilities at the project site.

(iv) The cost of an addition or improvement to an existing railroad facility which is required by the highway construction.

[40 FR 16059, April 9, 1975, as amended at 40 FR 29712, July 15, 1975; 47 FR 33956, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

APPENDIX J

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed: July 12, 2001]

CARL M. FLOOD, et al.,

Plaintiffs,

-V-

CSX TRANSPORTATION, INC., et al.,

Defendants.

Case No. C-2-99-1186
JUDGE SMITH
Magistrate Judge Kemp

OPINION AND ORDER

Plaintiffs assert claims for negligence, punitive damages, and of consortium against defendant CSX Transportation, Inc. ("CSX") out of an accident in which plaintiff was stuck and injured by defendant's train. This matter is before the Court on defendant's motion for partial judgment on the issue of federal preemption of plaintiffs' claim for negligence based upon defendant's alleged negligence in selecting, installing, and maintaining adequate warning devices at the crossing. For the following reasons, the Court grants defendant's motion for partial summary judgment.

I. FACTS

A.

Congress enacted the Federal Railroad Safety Act (FRSA) in 1970 to comprehensively deal with the issue of national

railroad safety. Congress set forth that the FRSA was intended to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents to persons . . . ." 49 U.S.C. § 20201. It contains provisions dealing with, among other things, the marking and visibility of railroad cars, § 20132, licensing of locomotive operators, § 20135, and testing for alcohol and controlled substances, § 20140. To aid in the achievement of these goals, the Act directs the Secretary of Transportation to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem . . . ." § 20134(a). The FRSA also contains an express pre-emption provision. § 20106. Even after federal standards have been promulgated, the states may adopt more stringent safety requirements when necessary to reduce or eliminate a local safety hazard, as long as those standards are not incompatible with federal law and not unduly burdensome to interstate commerce. *Id.*

In 1973, Congress enacted the Federal Highway Safety Act of 1973 ("FHSA"), which created the Federal Railway-Highway Crossings Program ("the Crossings Program"). 23 U.S.C. § 130. The Crossings Program makes funds available to the states for the "cost of construction of projects for the elimination of hazards of railway-highway crossings." § 130(a). To participate in the Crossings Program, the states must conduct and maintain a survey of all highways that identify railroad crossings that may require "'separation, relocation, or protection devices," and establish and implement a schedule of projects for this purpose. § 130(d). At a minimum, the schedule must provide for signs for all railroad-highway crossings. *Id.*

The Secretary of Transportation, through the Federal Highway Administration ("FHWA"), promulgated regulations implementing the Crossings Program; these regulations include provisions concerning the adequacy of design and use of certain grade crossing equipment and warning devices.

23 C.F.R. § 646.214(b). For all federally funded projects, the States must employ devices that conform to the most recent edition of the "Manual on Uniform Traffic Control Devices for Street and Highways" ("MUTCD"). § 646.214(b)(l). In addition to requiring compliance with MUTCD, §§ 646.214(b)(3) and (4) address the adequacy of warning devices installed under the program. "'Adequate warning devices', under 646.214(b)(2) or on any project where Federal-aid funds 'participate' in the installation of the devices are to include automatic gates with flashing light signals" if any of several special conditions exist. § 646.214(b)(3). Those conditions include: (A) multiple main line railroad tracks; (B) multiple tracks in the vicinity of the crossing such that one train stationary might obscure the movement of another train approaching the crossing; (C) high speed trains at a single or multiple track crossing that has limited sight distance; (D) a combination of either high speeds and moderately high volumes of highway and railroad traffic; (E) either a high volume of vehicular traffic, train movements, substantial numbers of school buses, trucks carrying hazardous materials, unusually restrictive sight distances, or any combination of these; or (F) when a "diagnostic team recommends them." § 646.213(b)(3)(1).

Subsection (b)(4) states that where the requirements of subsection (b)(3) are not applicable, the type of warning device to be installed is subject to FHWA approval, regardless of whether the initial determination is made by a state regulatory agency, state highway agency, and/or the railroad. Therefore, at crossings when any of the conditions contained in (b)(3) exist, adequate warning devices are automatic gates and flashing lights if these are installed using federal funds. Otherwise, where the conditions in (b)(3) are not present, the decision of what devices to install are left to FHWA approval.

Before the States can begin work on any Federal-aid project, a states must submit plans, specifications, and estimates to the FHWA describing the location and design features and constructions requirements. 23 C.F.R. § 630.205. A state's transportation board must obtain authorization to proceed from the FHWA prior to commencement of any Federal-aid highway project. 23 C.F.R. §§ 630.106(a)(1); 630.205(d), (e).

B.

On October 16, 1997, plaintiff Carl Flood drove his dump truck eastbound on Bunty Station Road in rural Delaware County. As plaintiff crossed the railroad tracks intersecting the road, he was struck and injured by a freight train operated by defendant CSX Transportation being driven northbound on a single main line track. At the time of the accident, the Bunty Station Road crossing was equipped with two "improved standard" crossbuck signs.[1] The "improved standard" crossbucks have reflective black-on-white lettering, reflective material on the front and rear of the sign posts, and reflective material on the front and rear of the crossblade posts.[2]

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[1] Crossbucks are the familiar black-and white, X-shaped signs that read "RAILROAD CROSSING."

[2] Other signs installed at other crossings were the experimental "Buckeye" Crossbucks. These signs appeared the same as the "improved standard" crossbucks, but also had red-on-white reflective lettering, and a new sign mounted on the crossbucks post at mototists' eye level 38" high that had the word "YIELD" on it in large red, reflective lettering. This additional sign is designed to increase motorist recognition of the rail-highway crossing, and angled to reflect the oncoming train headlight in the direction of the motorist, thereby warning of approaching trains. All four sides of the "Buckeye" crossbucks contain reflectors as well. While the added features of the experimental system are most effective at night, the red on white color scheme and supplemental three-paneled shield adds value for increased daytime recognition.

On April 22, 1994, the FHWA issued the Ohio Department of Transportation ("ODOT") a letter of approval and authorization allowing Ohio to proceed with statewide installation of the Buckeye Crossbuck signs under the Buckeye Crossbuck Program at CSX rail lines statewide (Doc. 31, Exh. C). The plan called for replacement of existing crossbucks at passive crossings[3] with experimental Buckeye Crossbucks at crossings identified by ODOT's inventory identification as even-numbered crossings, and "improved standard" reflectorized crossbucks at ODOT-recognized odd-numbered crossings. On December 7, 1995, two "improved standard" crossbucks were installed at the Bunty Station Road crossing as this crossing was identified by ODOT as an odd-numbered crossing.

II. SUMMARY JUDGMENT STANDARD

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(e), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *See Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate,

---

[3] Passive crossings are defined as those that necessitate only the standard crossbucks, as opposed to active crossings, which are defined as those necessitation crossbucks, flashing lights, and preventative gates.

however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" of summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Matsushita* 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* Rather, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III. DISCUSSION

"When a state statute conflicts with, or frustrates, federal law, the former must give way." U.S. Const., Art. VI, cl. 2; *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). Plaintiffs argue that defendant CSX had a state law duty to select, install, and maintain active warning devices at the Bunty Station Road crossing. The Supreme Court held in *Easterwood* that the language of the FSRA's pre-emptive provision will only lie if federal regulations substantially subsume, or cover, the subject matter of the relevant state law. *See id.* at 664. The Court therefore concluded that §§ 646.214(b)(3) and (4) were pre-emptive because they displaced state and private decision-making authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. *See id.* at 670. Accordingly, the federal regulations cover the same subject matter of warning device selection, and, when applicable, preempt state tort law. *See id.* at 670

Sections 646.214(b)(3) and (4) are "applicable" when three requirements are met: (1) the FHWA approves a crossing improvement project; (2) the improvements are "actually installed and operating"; and, (3) federal funds participate in the crossing improvement project. *See Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 354 (2000). Defendants submit the uncontroverted affidavit of Susan J. Kirkland, Manager of the Rail-Highway Safety Section of the Ohio Rail Development Commission, which oversees the Buckeye Crossbuck Program. Ms. Kirkland avers that the warnings at the Bunty Station Road crossing were installed on December 7, 1995 pursuant to approval granted by the FHWA and paid for entirely with federal funds. Exhibits containing documents of the Ohio Rail Development Commission accompany and support her affidavit (See Kirkland Aff., Exhs A-E). As a result, Ohio tort law that

purports to place an independent duty upon defendant to select, install, and maintain active warning devices is preempted.

Nevertheless, plaintiffs advance arguments that preemption is inapplicable in this case. Plaintiff's contend that §§ 646.214(b)(3) and (4) do not apply to the Bunty Station Road crossbucks because their installation was authorized pursuant to 23 U.S.C. § 403 and funded pursuant to the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub.L. 102-240, at 105 Stat. 1914-2207, which provides authorization and funding for highway safety and demonstration projects. ISTEA is extensive legislation affecting railroad and highway safety. However, the mere fact that the Buckeye Crossbucks Program may have been funded in part from funds appropriated by ISTEA does not affect preemption. The plain language of the regulations belie this interpretation. Section 626.200(b) states:

> [t]his subpart, and all references hereinafter made to "projects," applies to *Federal-aid projects* involving railroad facilities, including projects for the elimination of hazards of railroad-highway crossings [emphasis added].

This language demonstrates that the term "projects" applies to all railroad projects in which federal-aid is involved. § 644.206 supports this view. It states:

> [p]rojects for the elimination of hazards, to both vehicles and pedestrians, of railroad-highway crossings *may include but are not limited to*:
>
> (1) grade crossing elimination;
>
> (2) reconstruction of existing grade separations; and,
>
> (3) grade crossing improvements.

[emphasis added]. Thus, the definition of those types of projects authorized by subpart B of § 646 appear to not be

subject to any limitation based on the particular federal funding mechanism used. Further, the source of funding for a railroad crossings project appears to be immaterial as well. § 646.208(a) provides that railroad or highway crossing projects "may be funded through the Federal-aid funding source appropriate for the involved project." Section 646.214(b)(3) itself, standing alone, demonstrates that the Secretary of Transportation intended to include all railroad crossing projects within the purview of the regulation. It applies the definition of adequacy of crossing warning devices to "*any* project where Federal-aid funds participate in the installation of the devices . . . [emphasis added].

Shanklin is determinative on the issue of federal preemption based on § 646.214(b)(3) and (4). The Court's sweeping language in *Shanklin* supports the conclusion that the authorizing statute or source of funds is immaterial to a finding of preemption. The Court found the determinative issue to be "whether §§ 646.214(b)(3) and (4) 'are applicable' to *all* warning devices actually installed with federal funds [emphasis added]." *Shanklin* 529 U.S. at 353. Later, the Court concluded that § 646.214(b)(3) applies to "*any* project where Federal-aid funds participate in the installation of the devices," and § 646.214(b)(4) applies to "all federally funded crossings that do not meet the criteria specified in (b)(3)." *Id.* at 356.

Plaintiffs' first argument is also futile in light of their second argument, both widely-held and incorrect, that preemption should not apply where no independent adequacy determination has occurred under the regulations, or the incorrect type of warning was installed. *Shanklin* is clear that evidence of an individualized crossing determination is not a necessary predicate to a finding of preemption. The Court held:

> Nor does their [the regulations'] applicability depend on any individualized determination of adequacy by a

> diagnostic team or an FHWA official. Rather, as the FHWA itself explained in its *Easterwood* brief, §§ 646.214(b)(3) and (4) have a "comprehensive scope."

The Court also specifically rejected the "minimum protection" versus "priority" or "hazard" program, noting that it contradicted the plain text of the regulation. *See id.* at 355-356. The type of crossing installed has no bearing on the issue of preemption. In the same way, the source of authorization or funding for a particular crossing has no bearing on the issue of preemption. As a result, plaintiffs' arguments are without merit.

IV. CONCLUSION

Based on the foregoing, defendant's partial motion for summary judgment motion is GRANTED as to the issue of pre-emption on plaintiffs' claim of negligent design, installation, and maintenance of the warnings at Bunty Station Road.

The Clerk shall remove document 31 from the Court's pending motions list.

IT IS SO ORDERED

/s/ GEORGE C. SMITH
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED
OCT 7 2002
OFFICE OF THE CLERK

No. 02-362

In the

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,

Petitioner,

v.

CRIS BONACORSI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Ohio Supreme Court issues a decision holding that a party is not entitled to summary judgment under Ohio Rule of Civil Procedure 56(E), Ohio Rule of Evidence 602 and Ohio case law, because it relied on an affidavit based on hearsay, rather than personal knowledge. Should this Court now exercise its discretionary review over that state law decision?

2. Both this Court and the Tenth Circuit Court of Appeals hold that federal preemption is triggered by proof of actual federal funding, i.e. expenditure of federal funds. Is a motion for summary judgment based on preemption properly denied when the movant fails to support it with competent, undisputed evidence of the expenditure of federal funds?

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STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Wheeling & Lake Erie Railway Company ("the Railroad") seeks to have this Court set aside a jury verdict and finding of negligence against it for Respondent Cris Bonacorsi's life threatening injuries, including the loss of his leg. Bonacorsi sustained these injuries on July 13, 1996, when his motorcycle collided with the Railroad's speeding locomotive at a rural crossing near Kent, Ohio, where dense trees and shrubbery blocked the view of approaching trains (the "Howe Road crossing").

The Howe Road crossing was marked with a yield sign and a $135 crossbuck sign installed as part of an experimental research project involving passive grade crossings throughout Ohio. The research was undertaken to compare the effectiveness of an experimental red and white crossbuck with a reflectorized yield sign, originally designed by Conrail, but now known as the "Buckeye" crossbuck, against a standard crossbuck with reflectorized tape on the pole. The signs were installed randomly and without regard to crossing conditions, so as to eliminate all variables other than the design of the sign. Even numbered crossings received the experimental Buckeye crossbuck, and odd numbered crossings -- including the Howe Road crossing -- received a standard crossbuck. As of the filing date of this Brief, the research has yet to be completed.

At the point of approach along Howe Road where drivers should be able to see 260 feet of unobstructed track, according to traffic safety engineering guidelines, only 28 feet of track was visible to approaching motorists because of the obstructing vegetation. Because of these sight

obstructions, Cris Bonacorsi approached the Petitioner's Howe Road crossing unable to see a coming train. Nor could he hear the train because Petitioner's engineer failed to sound the horn in the time, manner and distance required by Ohio statute and Petitioner's own operating procedures.[1]

When Bonacorsi first became aware of the train, it was less than an engine length from the crossing, traveling in excess of the federal track speed limit. (Had the train not been speeding, the accident would never have occurred).[2] Bonacorsi had insufficient warning of the train to avoid sliding into one of the front wheels of the locomotive as it entered the crossing. The locomotive tore off his leg, dragged him 100 yards down the tracks and caused his near fatal injuries.

Less than a month later, another accident occurred at the crossing, the fourth in less than two years. The Ohio Public Utilities Commission ordered the Howe Road crossing upgraded, and flashing lights and gates were installed at the crossing.

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[1]Under Ohio Law, engineers are required to sound the train horn at least 1320 feet from the crossing and continued to sound it at frequent intervals until the locomotive has passed through the crossing. Ohio Revised Code §4999.04. App. 4a. Here, the conductor testified that the horn may not have been sounded until the train was 880 feet from the crossing. The evidence further showed, as confirmed by the train's event recorder, that the crew failed to provide the required 4 second blast of the horn as they entered the final approach to the crossing when the train was still hidden behind the trees, a violation of Petitioner's operating procedures.

[2]According to the train's event recorder, the train was traveling 26 mph instead of the 25 mph posted speed limit as it approached and entered the hazardous crossing. By contrast, Bonacorsi's speed was 10 mph under the speed limit at the point of impact.

At trial, multiple claims were submitted to the jury. In addition to a claim based on the failure to install lights and gates at an ultra hazardous crossing, separate state law claims were presented based on negligent train operation for Petitioner's failure to exercise ordinary care, specifically, (1) its failure to maintain a lawful speed, (2) failure to maintain a proper lookout and (3) failure to properly sound the horn. Any or all of these claims may have formed the basis for the jury's verdict.[3]

B. Petitioner's Failure to Prove Preemption

Petitioner was provided three separate opportunities to move for summary judgment or reconsideration of summary judgment on the issue of preemption of Respondent's claims based on the failure to install lights and gates. (It was undisputed that these motions did not address the negligent train operation claims which would remain for trial.) In addition, the trial court gave Petitioner the opportunity to present evidence of federal funding at a preemption hearing held shortly before trial. But Petitioner's trial counsel admitted he had none:

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[3]When asked for the basis of its finding of negligence against the railroad, the jury wrote in its interrogatory answer: "two prior accidents; railroad did not initiate change in signals and signs. *Proving [a lack of] ordinary care.* Plaintiff unable to see train." (Emphasis added). Under Ohio law, jury interrogatories are to be construed in favor of upholding the verdict. *Becker v. BancOhio National Bank*, 17 Ohio St.3d 158 (1985); *Klever v. Reid Bros. Express, Inc.*, 151 Ohio St. 467, 474 (1949); A verdict may be set aside and judgment entered on the interrogatory only when it is "*impossible*" to reconcile the interrogatory with the general verdict. *Shaffer v. Maier*, 68 Ohio St.3d. 416, 423-424 (1994)(J. Ford, Moyer and Wright, dissenting)(Emphasis by the Court).

> Now as I stand here today, I am not prepared to present evidence to show that the dollars that were spent at Howe Road, in fact flowed from the federal government other than the fact that by implication of everything that's here, that's what happened.

(Tr. of Proceedings, June 3, 1999, pp. 80-90). Summary judgment "by implication" is not the standard under Ohio law.

This admission stands in stark contrast to the record before this Court in *Norfolk & Southern Railway v. Shanklin*, 529 U.S. 344 (2000). First, in *Shanklin*, there was an agreement between the State of Tennessee and the railroad, which had been approved and executed by the FHWA. Here, only a contract between the State of Ohio and Petitioner was introduced below. In addition, the Court in *Shanklin* relied on the application for funding and documents entitled "Federal-Aid Project," "Final Inspection of Federal-Aid Project," and "Certification Acceptance Final Inspection Report." (Ohio S.Ct. Supp., pp. 154, 157). Most importantly, the "Final Inspection" showed the date of actual disbursement of FHWA funds to the TDOT long before Shanklin's accident. The lower right hand corner of the FHWA Final Inspection form was also marked "**Paid**," indicating that the project had been completed and federally funded. (Ohio S.Ct. Supp., p.155).

Petitioner produced no such evidence in this case. Instead, it offered an affidavit of a railroad employee, whose testimony was based on a contract attached to and incorporated into his affidavit between the Railroad and the state. However, the applicability of that contract to the Howe Road crossing was disputed by the terms of the

contract itself; the contract applied to work completed by 1993, and the crossbuck was not installed at the Howe Road crossing until 1995. The Railroad then relied on the affidavit of a state employee, Susan Kirkland, which purportedly was based on personal knowledge, but which she later conceded at deposition was based on what others told her. Petitioner's characterization of the Kirkland affidavit as being "uncontradicted" is not true. It was contradicted by Kirkland's own deposition.[4]

After Petitioner's motions for partial summary judgment were denied, and the case proceeded to trial, Petitioner abandoned its preemption defense. Petitioner failed to present any witnesses on the issue, and failed to introduce into evidence any admissible documents on preemption or federal funding. The Railroad never moved for directed verdict on federal preemption, nor did it request any jury charges on the issue.

Eight months after the verdict, while this case was on appeal, *Shanklin* was decided. Petitioner tried to resurrect a preemption defense. But by then, the paucity of the record was apparent: there was no competent evidence on which a finding of federal funding could be made to support summary judgment based on federal preemption.

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[4]Petitioner is also incorrect in stating that the trial court denied Respondent's motion to strike Kirkland's affidavit. It was never ruled on, and instead the trial court granted leave for Respondent to take Kirkland's deposition. Once that deposition was taken and filed, the court then denied summary judgment.

REASONS FOR DENYING THE PETITION

I. A STATE COURT DECISION THAT AN AFFIDAVIT MUST BE BASED ON PERSONAL KNOWLEDGE, RATHER THAN HEARSAY, UNDER STATE EVIDENCE RULES AND STATE RULES OF PROCEDURE DOES NOT WARRANT THIS COURT'S REVIEW.

In ruling on Petitioner's motion for summary judgment, the Ohio Supreme Court did not impose any "special" or "heightened evidentiary standards." Rather, it applied well-settled rules of Ohio civil procedure and Ohio evidence that uniformly govern summary judgment practice in Ohio state courts. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314 (2002). Since the case was decided solely on state grounds, the federal issue was never decided.[5] *Id.*, Pet. App. A, 11a, Par. 29. The Ohio Supreme Court did not reach the issue of federal preemption, nor any other federal issue. The decision is therefore not subject to review by this Court.

In reaching its decision, the Ohio Supreme Court set forth the applicable state procedural and evidentiary standards as follows:

> Civ R. 56(E) requires that affidavits supporting motions for summary judgment be

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[5]Bonacorsi argued that while *Shanklin* allowed for preemption under the Crossings Program, because crossing conditions under that program are specifically to be considered as part of the funding and approval process, those same considerations do not apply to an experimental research program, like the present one, where signs were randomly placed at crossings without consideration of specific crossing conditions.

> made on personal knowledge. *State ex. rel. Cassels v. Dayton City School Dist. Bd. Of Ed.*, 69 Ohio St. 3d 217, 223, 631 N.E. 2d. 150 (1994). For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. *Id.*; Evid. R. 602. "Personal knowledge" is "[k]nowledge gained though first-hand observation or experience, *as distinguished from a belief based on what someone else has said.*" Black's Law Dictionary (7th Ed. Rev. 1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the sense of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.") (Emphasis added).

Pet. App. A, 10a, Par. 26.

These standards are similar to their federal counterparts. Ohio Civ. R. 56(C) provides that summary judgment will only be granted when depositions and affidavits show that there are no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Ohio Evid. Rule 602 provides that a witness may only testify to matters of personal knowledge.[6] The Ohio Supreme Court found that these requirements were not met due to a conflict between Susan Kirkland's affidavit and her later deposition testimony on the dispositive issue of federal funding:

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[6]Ohio Rule of Civil Procedure, Rule 56, and Ohio Rule of Evidence, Rule 602, are reprinted in App. 1a, 3a.

> Kirkland explicitly states in her affidavit that she had 'personal knowledge' that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT [Ohio Department of Transportation] was responsible for handling federal funds, that she did not work for ODOT, *and that her knowledge that federal funds were used to install signs at railroad crossings came from other people.*
>
> After reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ. R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign. Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted." (Emphasis added).[7]

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[7]Contrary to her affidavit, Kirkland testified at deposition that she had no personal knowledge regarding the receipt of federal funding for the Buckeye Crossbuck Program. (Kirkland Depo., p. 26, lines 12-16; p. 30, lines 9-12; p. 31, lines 15-18, S. 128, 132, 133). She admitted her knowledge regarding the receipt of federal funding for the project was based on second-hand hearsay, not personal knowledge. (*Id.*, p. 26, lines 12-16; p. 30, lines 9-12; p. 31, lines 15-18). At her deposition she conceded her "knowledge of funds spent at that location would come from other people who actually handled the funds." (*Id.*, pp. 13-15).

Pet. App. A, 10a-11a, Pars. 27-28.

The court further noted that Petitioner failed to offer any documentary evidence of federal funding. This included Petitioner's failure to produce the alleged agreement with the federal government requiring the use of federal funds for the crossbucks. Pet. App. A., 11a, fn.10. The contract that provided for the installation of the Buckeye Crossbuck was a contract between a state agency, the Ohio Department of Transportation, and the Railroad. It provided that the state was to reimburse the Railroad. No branch of the federal government was a party to the agreement. Thus, the contract also established that employees of ODOT would be the ones knowledgeable of the nature of funds used to install crossbucks under the agreement, not an employee of the Ohio Rail Commission like Kirkland. The Railroad failed to provide any evidence from an ODOT employee or from the federal government on the issue of federal funding.

Petitioner Railroad continues to argue that Kirkland's affidavit is governed by the law in *State ex rel Corrigan v. Seminatore,* 66 Ohio St.2d 459 (1981), but ignores the first words of the syllabus:

> *Unless controverted by other evidence*, a specific averment that an affidavit pertaining to a business of a board is made upon personal knowledge of the affiant or chairman satisfies the Civ. R. 56 (E) requirements that the affidavit supporting an opposing motion for summary judgment showed that the affiant is competent to testify to the matters stated. (Emphasis added.)

Unlike the situation in *Seminatore,* the *Bonacorsi* case involved a conflict between an affidavit and deposition testimony.[8] The subsequent deposition testimony of Kirkland discredits and impeaches her affidavit.

When there is a conflict between an affidavit and deposition testimony, a party is unable to establish the absence of genuine issues of material fact. The Ohio Supreme Court's ruling is consistent with its prior ruling in *Turner v. Turner*, 67 Ohio St.3d 337, Syllabus, Par. 1 (1993), that summary judgment is improper where an affidavit in support of a motion for summary judgment is inconsistent with deposition testimony, as well as established Ohio precedent on Civ. R. 56 and affidavits. See e.g., *State ex rel Seminatore, supra.*; *Turner v. Turner, supra*; *State ex rel Bd. of Commr. of Millcreek Metropolitan Park Dist. v. Tablack,* 86 Ohio St.3d 293, 297 (1999) (a party erroneously relies on affidavits not based on personal knowledge); *State ex rel Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 223 (1994) (a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter).

Morever, in considering summary judgment, an Ohio state trial court must resolve all doubts and construe the evidence against the moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d, 7-12 (1983). This is exactly what the Ohio Supreme Court did. The Ohio Supreme Court's decision is also consistent with this Court's

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[8]This case is therefore distinguishable from *Flood v. CSX Transp., Inc.*, No. C-2-99-1186, slip op. (S.D. Ohio July 12, 2001), cited by Petitioner (Petition, p.16). In *Flood*, unlike the situation here, Kirkland was not deposed and therefore her affidavit was not controverted by her deposition testimony.

precedents which acknowledge the stringent standard for finding preemption and the presumption against it. *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 668 (1993); *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 251 (1984). It also is consistent with this Court's requirement that the party claiming preemption has the burden of demonstrating its existence. *Silkwood,* 464 U.S. at 255.

Kirkland's deposition testimony established that the assertion of personal knowledge of federal spending in her affidavit was not true. Based on Petitioner's failure to set forth competent, undisputed evidence, summary judgment was properly denied. Once summary judgment is denied, the party then proceeds to trial with the issue still in the case. At trial, Petitioner was obligated to produce competent evidence of federal funding. Unable to garnish the evidence it needed, or believing the issue was one it could not win, Petitioner abandoned its preemption defense at trial, and offered no such evidence. Indeed, Petitioner's counsel conceded it lacked such evidence at the hearing held shortly before trial on preemption. ("I am not prepared to present evidence to show that the dollars that were spent at Howe Road, in fact flowed from the federal government.") (Tr., June 3, 1999, pp. 80-90).

Issues involving local state rules of evidence and procedure are outside this Court's review. Thus, a petition for certiorari will not be granted to review a determination that is a matter of local law such as rules of evidence prevailing in state courts. *Griffen v. United States,* 336 U.S. 704, 709 (1949). Formation of rules of evidence is a matter purely of local law to be determined by the highest local appellate court. *Griffen,* 336 U.S. at 717. See also, *Israel v. McMorris*, 455 U.S. 967 (1982) (petition for writ of certiorari denied when issue involves a state rule of

evidence).

Nor will this Court grant certiorari when state procedural rules are the basis for the state court's decision. *Duncan v. Tennessee,* 405 U.S. 127 (1972). The failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground for this Court to deny review, so long as the state has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler*, 436 U.S. 499, 512, fn. 7 (1978). The Railroad in this case does not claim that Ohio Civ. R. 56 fails to serve a legitimate purpose. Moreover, this Court has held that it will not entertain a claim when the state has a legitimate interest in performing its procedural rule. *Id.*

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. *Coleman v. Thompson,* 501 U.S. 722, 729 (1991). This rule applies whether the state law ground is substantive or procedural. *Id.* In the context of the direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. *Id.* When this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not effect the judgment and would therefore be advisory. *Id.* This Court is not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after this Court corrected its views of federal laws, this Court's review amounts to nothing more than an advisory opinion. *Id.*

In this case, the Ohio Supreme Court specifically stated that it was not addressing the merits of whether *Shanklin* would apply to this case and instead found that Petitioner had simply failed to meet state procedural and evidentiary requirements for prevailing on summary judgment. (Pet. App. A, 11a, Par. 29). Our dual system of government recognizes the finality of a judgment by a state's highest court on the interpretation of its own state rules of evidence and procedure, and such decisions should not be disturbed by this Court.

In similar cases, this Court has recently denied certiorari to review other state decisions in which the railroads failed to offer sufficient evidence of federal funding to support a claim for preemption. See, *Kansas City Southern Railway v. Johnson,* 798 So.2d 374, 379 (Miss. 2001), cert. denied 122 S. Ct. 43 (2001) and *Duncan v. Kansas City Southern Railway*, 773 So.2d 670, 680 (La. 2000), cert. denied 532 U.S. 992 (2001). Those decisions, like the Ohio Supreme Court's decision here, were based on state court rulings that there was a failure to meet state evidentiary requirements. Certiorari was properly denied in those cases and should be denied in this case as well. This Court should not become a court of last resort for deciding if a party has met state law evidentiary standards for summary judgment. Such "pedestrian issue[s] of evidentiary sufficiency," as Petitioner describes them (Petition, p.17), are not subject matters for this Court's review.

II. THE OHIO SUPREME COURT'S DECISION IS CONSISTENT WITH DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE ISSUE OF FEDERAL FUNDING.

In ruling on Petitioner's request for summary judgment, the Ohio Supreme Court did not create a new standard for federal preemption, but narrowly decided the case solely on state procedure and evidence rules. Even so, its discussion of federal preemption law was consistent with this Court's precedent in *Shanklin* and *Easterwood*. Indeed, Petitioner is the one that now seeks to overturn those decisions by adopting an unworkable rule in which the pivotal issue of federal funding would no longer turn on evidence of actual funding. Instead, Petitioner would have this Court adopt a new standard where preemption occurs prematurely – "when the state commences work that is reimbursable with federal funds." (Petition, p.3).

First, this standard was already rejected by this Court in *Easterwood*, where this Court found that the commitment of federal funds alone is insufficient proof for federal preemption. Moreover, under Petitioner's rule, preemption could be invoked even if committed funds are later diverted to another project or withdrawn. It would also eliminate a critical step in the approval process. It would no longer ensure a certification with the final bill that the work is "complete, acceptable and in accordance with the terms of the agreement." (See Petition, p.23, fn.14). Petitioner seeks to impose immunity on negligent railroads with no corresponding assurance that federal funds are in fact expended or that the installed devices receive final approval.

In *Easterwood,* this Court held that the facts did not establish that federal funds "participated in the installation of the warning devices" when funds had been committed but spent elsewhere. *Easterwood*, 507 U.S. at 672. There, federal funds were allocated for the crossing, and reimbursable work begun; however, the funds were later diverted to another project when the original project was "scotched" before it was completed. *Id.* at 673-74. Thus, in *Easterwood,* where federal funds had actually been committed, but not spent, this Court held that there was insufficient proof for preemption.

Easterwood was followed and relied upon by the Ohio Supreme Court in the case of *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St.3d 259 (1994). *Carpenter* was then cited by the Ohio Supreme Court in the present case in discussing the Petitioner's failure to offer evidence of actual participation of federal funding:

> "Proof of federal funding is crucial to W&LE's preemption argument because the federal regulation that covers the subject of warning-device adequacy applies only to warning devices installed with federal funds. Section 646.214(b)(3)(i), Title 23, C.F.R. (See footnote 4): *Carpenter v. Consol. Rail Corp.* (1994), 69 Ohio St.3d 259, 263, 631 N.E. 2d. 607 (Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent)"[9] (App. A., 10a, par.

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[9]In *Carpenter*, the Ohio Supreme Court refers to *Easterwood* and states:

> Apparently the [*Easterwood*] Court concluded that planning and preparation are insufficient to invoke

25).

The Ohio Supreme Court's ruling is consistent with both *Easterwood* and *Shanklin*. According to *Shanklin*, preemption occurs when three requirements are met: (1) the FHWA approves a crossing improvement project, (2) the improvements are actually installed and operating, and (3) federal funds participate in the crossing improvement project. *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000). As to this third element, this Court explicitly stated that preemption arises "*once the FHWA has funded* the crossing improvement and the warning devices are actually installed and operating." *Id.* at 354. (Emphasis added). Thus, under both *Easterwood* and *Shanklin*, actual funding, rather than a mere commitment to fund, is required to prove preemption.

In *Shanklin*, preemption was found to exist because, unlike here, the record contained proof that the project had been paid for with federal funds. In *Shanklin*, the FHWA had approved the project and federal funds actually accounted for 99% of the costs for the signs installed. *Shanklin*, 529 U.S. at 350. The record before this Court in *Shanklin* included a document that the federal funds were in fact "paid" and disbursed before the accident and also included a final inspection report approving the project and disbursement. (See "Certification Acceptance Final

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> preemption. Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent, and the "warning devices," as defined in Sections 646.204(i) and (j), Title 23, C.F. R. must have been installed.

Carpenter, 631 N.E. 2d at 610.

Inspection Report," Ohio S. Ct. Supp., pp. 154, 155, 157). Further, in *Shanklin*, the railroad also produced the agreement which the federal government executed obligating the use of federal funds for the project.

The lower court decisions cited by the Railroad in its Petition further support the proposition that a party must show proof of actual expenditures of federal funds before preemption will apply. Moreover, none of those cases contained factual disputes between an affidavit and deposition like that contained here that would require a denial of summary judgment. For example, in *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), cert. denied, 516 U.S. 1093 (1996), in addressing whether federal funds "participated" in the installation of the warning devices under *Easterwood,* the court recognized that "there must be *an actual, authorized expenditure* of federal funds in the installation or placement of safety devices at the particular crossing to trigger preemption." *Id.* at 562. (Emphasis added). There the evidence showed that federal funds had in fact been approved and expended years before the accident at issue.

In *O'Bannon v. Union Pac. R.R.*, 169 F.3d 1088, 1099 (8th Cir. 1999), the court found preemption based on an affidavit that the railroad *had actually received payment* for the work performed before the accident where it was "*not disputed that federal funds were part of the payment actually made.*" (Emphasis added). In *Bryan v. Norfolk & W. Ry.*, 154 F.3d 899 (8th Cir. 1998), the court recognized that the preemptive "[f]ederal regulations are applicable if federal funds have been *expended* for the installation of the warning devices at the crossing." *Id.* at 903. In that case, in support its motion for summary judgment, the railroad presented both a deposition and an affidavit that *it had been*

reimbursed by federal monies, including those for the crossing at issue. The court therefore found that "[t]his *uncontradicted* evidence demonstrates conclusively that federal funds were expended for the crossbucks at the Massas crossing." *Id.* (Emphasis added). The court noted that once federal funds *have been expended,* and those devices are installed and operating, state law negligence claims are preempted by federal regulations.

Likewise, in *Hatfield v. Burlington N. R.R. Co.*, 64 F.3d 559, 562 (10th Cir. 1995), the court found that preemption takes place when the federal government (1) commits itself through a significant event to a project to install warning devices, and (2) *expends* significant federal resources on the project. (Emphasis added). Thus, it is insufficient under the second prong merely to authorize that federal funds be spent; instead, *Hatfield* requires "the actual expenditure of federal resources of more than a casual or de minimis nature for preemption to occur." *Id.* at 562. See *Armijo v. Atchison, Topeka & Santa Fe. R. Co.*, 87 F.3d 1188, 1193 (10th Cir. 1996) (J. Ebel, dissenting). Further, in *Hatfield* the court noted that the federal government had actually *expended* funds and federal resources on the project. *Hatfield*, 64 F.3d at 563.[10]

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[10]See also, *Powers v. CSX Transp. Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000) ("plaintiff *concedes*" that devices where installed "with FHWA authorization and participation of federal funds, based on an FHWA executed Federal Aid Project Agreement referencing an authorization to proceed with the project, an obligation to pay 90% of the costs and proof that the Alabama DOT had *received* nearly $25,000 from the FHWA for the project.) (Emphasis added); *McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995) (Finding preemption based on the participation of federal funds where the railroad "presented evidence that from 1977 to 1981 funds approved under Section 203 of Federal Aid Highway Act of 1976 *were expended*" in the upgrading and installation of warning devices. The evidence

Furthermore, this Court should reject Petitioner's contention that there is an alleged conflict between the Tenth Circuit's decision in *Armijo* and the present case. First, *Armijo* is distinguishable from the present case and therefore not in conflict with it. In addition, this Court granted certiorari in *Shanklin* to resolve a conflict among court of appeals on the application of the Federal Railroad Safety Act, citing to the decision *Armijo v. Atchison, Topeka & Santa Fe. R. Co.*, 87 F.3d 1188 (10th Cir. 1996). Since this Court made its ruling in *Shanklin* after consideration of that decision, that decision does not justify accepting certiorari in this case.

In *Armijo*, the court held that the financial commitment by the federal government must be such that it shows a clear federal intent to require a federally approved warning device at the crossing in question, backed up by the *actual expenditure* of federal resources of more than a casual or de minimis nature. *Id.* at 1190. The *Armijo* court held that the issue in the case was whether federal funds participated in some significant way in the installation of warning devices before the date of the accident for the crossing at issue. Significantly, there it was "clear that the federal government had reimbursed the state for the cost[s]...Therefore, prior to

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further showed that federal funds were "approved *and expended*" from 1989 to the early 1990's); *Cochran v. CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000) ("*it is undisputed that crossbucks were installed...almost exclusively with federal funds* under a program approved by the FHWA."); *Williams v. CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996), *aff'd without opinion*, 139 F. 3d 899 (5th Cir. 1998) (Railroad's affidavit showed how federal funds were used in upgrading crossing. Plaintiff made no attempt to discredit the affidavit on the issue of federal funding, except to argue there existed a "similar" crossbuck before the federally funded improvements, which "falls short of creating an issue of fact with respect to whether federal funds were used in the improvements").

the time of this accident, the federal government's participation was significant enough to trigger preemption." *Id.* at 1193. Thus, there is no conflict between the Ohio Supreme Court's ruling in *Bonacorsi* and the court's ruling in the *Armijo* case.

Unlike *Armijo* and the other decisions Petitioner relies on, the Railroad here failed to prove federal funding and expenditures before Bonacorsi's accident. Without such evidence, a preemption claim must fail.

Petitioner expects federal preemption without proving federal funding. Apparently, when this case was proceeding through the trial court, Petitioner did not anticipate this Court's decision in *Shanklin*, and therefore failed to obtain the evidence needed to support summary judgment under well-established Ohio rules of procedure and evidence. Incompetent affidavits based on hearsay, rather than personal knowledge, have routinely been rejected by Ohio courts. There is nothing novel or unfair about the Ohio Supreme Court's decision to enforce these state evidentiary requirements that apply to all summary judgment motions filed in Ohio state courts. Preemption by presumption has never been the standard in Ohio or elsewhere.

Notwithstanding Petitioner's attempts to elevate this case into a matter of national importance, it remains a state law decision that does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Ohio Civ. R. 56. Summary Judgment

(A) For party seeking affirmative relief.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written

stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) When affidavits unavailable

Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Adopted eff. 7-1-70; amended eff. 7-1-76, 7-1-97, 7-1-99]

Ohio Evid. R. 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

[Adopted eff. 7-1-80]

OHIO REVISED CODE 4999.04. Duties of engineer

(A) No person in charge of a locomotive shall do the following:

(1) Fail to bring the locomotive to a full stop at least two hundred feet before arriving at a crossing with another track, or proceed through the crossing before signaled to do so or before the way is clear;

(2) When approaching a grade crossing, fail to sound the locomotive whistle at frequent intervals, beginning no less than thirteen hundred twenty feet from such crossing and continuing until the locomotive has passed the crossing.

(B) Whoever violates this section is guilty of a misdemeanor of the fourth degree. If violation of this section causes physical harm to any person, whoever violates this section is guilty of a misdemeanor of the third

degree.

[Effective Date: 8-26-77]

MOTION FILED
OCT 7 2002

No. 02-362

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF THE PETITION

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae.* This motion is filed pursuant to Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.* Respondent has refused consent.

Amicus curiae AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak, the national intercity passenger railroad company. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. AAR seeks leave to file a brief

* The letter expressing consent has been filed with the Clerk of the Court.

amicus curiae only when the case presents an issue of great significance to the railroad industry as a whole—and in those instances such requests have been granted.**

AAR often participates as *amicus curiae* in cases which raise issues related to implementation of the Federal Grade Crossing Safety Program, 23 U.S.C. § 130–typically suits brought under state law alleging negligent failure to install adequate crossing warning devices. Pursuant to the statute and regulations which implement the Federal Program, Congress and the Secretary of Transportation established a uniform, nationwide, data-driven process for addressing hazards at rail-highway grade crossings, which requires states to identify crossings in need of safety improvements and, with the assistance of federal money, to implement crossing improvement projects on a priority basis. AAR has had a long-standing involvement with the Federal Program, including its work with the U.S. Department of Transportation (initiated prior to the Program's inception) to compile a grade crossing inventory. The inventory serves as an important source of information for use in implementation of the Federal Program by federal and state authorities. Thus, AAR is thoroughly familiar with the operation of the Federal Program, as well as with the issues that arise with regularity in crossing cases and their impact on the railroad industry.

AAR filed *amicus* briefs in two cases before this Court which addressed the role of railroads in the Federal Program, and the interplay between the Federal Program and state tort law which purports to regulate grade crossing safety. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993). In those cases, this Court established that whenever federal

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** *E.g., National Railroad Passenger Corp. v. Griesser*, 122 S.Ct. 386 (2001); *Kansas City Southern Railway Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 S.Ct. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

funds participate in the installation of crossing warning devices, federal law displaces state law duties to select and install adequate devices. Under those circumstances, lawsuits seeking to enforce such state law duties are preempted. This case involves such a lawsuit and, though petitioner submitted an uncontroverted affidavit establishing the participation of federal funds in the installation of the warning device, the Ohio Supreme Court refused to recognize the preemption defense. This decision, which ignored both state precedents on the law of evidence and this Court's prior decisions, erected an evidentiary barrier that will all but eliminate the preemption defense in lawsuits brought in state court.

This result is of concern to AAR's member railroads, not only because it denied petitioner the ability to assert a legitimate defense to a lawsuit (and as a result left it liable for a large jury verdict), but also because it appears to be part of an emerging pattern of state courts imposing heightened evidentiary requirements on litigants seeking to establish federal preemption. *See e.g., Kansas City Southern Ry. v. Johnson,* 798 So.2d 374 (Miss.), *cert denied,* 122 S.Ct. 43 (2001). Contrary to the intent of Congress and the Secretary of Transportation, these decisions apply state law in situations where federal law must prevail. With this development in Ohio, a state in which a large number of railroads, including two of AAR's largest members, operate, AAR's members' concerns have been heightened. Unless the decision below is overturned, railroads will lose their ability to rely on this Court's precedents to determine whether state law duties, as opposed to the regulatory requirements of the Federal Program, are applicable.

When AAR participates in a case as *amicus curiae*, it brings a broad, industry-wide perspective to the issues before the court. This perspective often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this

case, AAR has already filed *amicus* briefs in the Ohio Court of Appeals and Supreme Court. AAR's long standing involvement in this case, and resultant familiarity with the course of the litigation, will enhance its ability to present to this Court the railroad industry's perpective on the impact of the decision below.

For these reasons, AAR respectfully requests that leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 90 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One matter of great importance to AAR members is grade crossing safety, an area impacted by actions of all three branches of government.

Crossing safety has long been a focus of public policy. The federal government has taken an active role in funding crossing improvements and regulating grade crossings, culminating with Congress establishing the Federal Grade Crossing Safety Program (section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283), and assigning responsibility for its implementation to the Secretary of Transportation. [Petition at. 4-7] State law also plays a role in the regulation of crossings, frequently in the form of litigation arising out of accidents between trains and motor vehicles at grade crossings.[2] The impact of this

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[1] No person or entity other than AAR has made monetary contributions toward this brief and no counsel for any party has authored this brief in whole or in part.

[2] In a rulemaking intended to adopt nationwide standards clarifying the allocation of responsibility for selection of crossing warning devices, the effectiveness of state tort law in promoting crossing safety was called into question by the federal government, which opined that the "ad hoc system of grade crossing improvements, driven by tort law and individual jury awards, runs counter to the goal of a uniform national program based

litigation often goes beyond the individual litigants, as opinions handed down by courts can have industry-wide ramifications, affecting the rights and responsibilities of all parties with a stake in crossing safety. As a result, and because grade crossings have such a pervasive presence on the rail network,[3] AAR frequently seeks to participate as *amicus curiae* in crossing cases.

Typically, suits arising from grade crossing accidents include claims that the railroad negligently failed to provide adequate warning devices at the crossing. These claims bring into focus the interplay between state common law rules related to crossings and the role of the federal government in grade crossing safety. Twice during the past decade, this Court has addressed that relationship and its impact on state tort law. *Norfolk Southern Ry. v. Shanklin,* 529 U.S. 344 (2000); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993). In *Easterwood*, this Court held that at crossings at which federal funds have participated in the installation of warning devices, state law duties to select and install adequate warning devices are preempted by the express preemption provision set forth in the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-548, 84 Stat. 971 (49

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on planning and prioritization." Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems: Notice of Proposed Rulemaking, 60 Fed. Reg. 11649, 11651 (1995). Although it ultimately was withdrawn, the government reaffirmed its adherence to the premises that underlay the proposed rule: "FRA continues to believe that the proper relationship between railroads and state and local governments in terms of selection and installation of warning devices is as proposed in the NPRM." Federal Railroad Administration, Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42733, 42734 (1997).

[3] As of 2001, there were 153,848 public grade crossings on the nation's rail system. Federal Railroad Administration, *Railroad Safety Statistics: Interim Report 2001*, Table 9-3, available at http://safetdata.fra.dot.gov/officeofsafety/Forms/Default.asp.

U.S.C. §20106), and regulations issued by the Secretary of Transportation at 23 C.F.R. §646.214(b)(3)&(4), which partially implement the Federal Program. 507 U.S. at 670-71. *Shanklin* reaffirmed the *Easterwood* decision, and clarified that federal funding triggers preemption without regard to whether it can be shown that (1) the Secretary of Transportation approved the warning devices as adequate; (2) a diagnostic team reviewed the crossing; or (3) the crossing characteristics listed in the regulations as warranting active devices are present at the crossing. 529 U.S. at 356-57.

Federal preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads. Lawsuits continue to be filed against railroads alleging negligent failure to provide adequate warning devices at crossings. Such claims persist even in cases where the warning devices at the crossing have been installed with federal funds, notwithstanding this Court's holding that

> [w]hat States cannot do–once they have installed federally funded devices at a particular crossing–is hold the railroad responsible for the adequacy of those devices.

Shanklin, 529 U.S. at 358.

These suits are characterized by new theories and strategies aimed at evading the *Easterwood/Shanklin* holdings, which sometimes, as in the court below, meet with success.[4] For example, after *Shanklin* was decided, a district court properly held that the installation of passive warning devices with federal funds preempted state law claims that the railroad failed to install adequate devices, notwithstanding a subse-

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[4] The decison below follows on a similar ruling by another state court which, in disregard of its long-settled law recognizing the *prima facie* weight accorded to affidavits and trial testimony, also ruled the railroad failed to prove federal funding of a crossing upgrade. *See Kansas City Southern Ry. v. Johnson,* 798 So.2d 374 (Miss.), *cert. denied,* 122 S.Ct. 43 (2001).

quent decision to upgrade the crossing with active devices. *CSX Transp., Inc. v. Powers*, 97 F. Supp.2d 1297, 1304 (S.D. Ala. 2000), *appeal pending*, No. 02-10999-EE (11th Cir.). Nonetheless, despite holding that the railroad could not be legally liable for the adequacy of the warning devices that were at the crossing at the time of the accident, the court went on to hold that the plaintiff's suit could go forward on the theory that the railroad negligently delayed the installation of the active devices. *Id.* at 1308.[5]

Through the Federal Grade Crossing Program, the state and federal governments work together to improve crossing safety, with the railroads having a well defined role in that process. In essence, suits that press warning device adequacy claims at crossings where federally funded devices have been installed demand that railroads institute private, independent programs to evaluate grade crossings, notwithstanding that such efforts would be duplicative of the Federal Program. To the extent courts continue to permit these suits, it undermines the uniformity Congress demanded when it enacted the Federal Program, and hinders the railroads' ability to rely on federal law in determining their responsibilities under the Program. Therefore, this case is of great concern and interest to AAR's member railroads.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner

SUMMARY OF THE ARGUMENT

The decision below should be reviewed because it improperly imposed on petitioner an unwarranted, heightened evidentiary requirement that served as a means for the court to ignore its obligation to enforce federal law. In

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[5] *But see Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923 (8th Cir. 1999), *cert. denied*, 529 U.S. 1086 (2000)(rejecting negligent delay claim).

disregarding petitioner's uncontroverted evidence that federal funds had participated in the installation of the warning device, the court below set aside a legitimate preemption defense to a state law claim alleging negligent failure to install adequate crossing warning devices. This case is part of an emerging pattern of state court decisions that, by imposing special evidentiary requirements on the federal preemption defense, undermine the uniformity in rail safety laws mandated by Congress and put railroads in an untenable position with regard to their obligations at crossings.

In reaching this erroneous decision, the court below relied on the standard for preemption set forth in a prior state decision which has been discredited by a subsequent decision of this Court. The erroneous standard followed by the court below led it to focus on irrelevant facts in determining whether petitioner had met its burden of showing that the crossing at which the accident occurred had been installed with federal funds. This Court should review this case and correct the erroneous preemption standard applied by the court below so that legitimate preemption defenses, which serve to effectuate Congress' policy choices, may be pursued in state court in Ohio and other states

ARGUMENT

I. THE COURT BELOW IMPOSED A HEIGHTENED EVIDENTIARY REQUIREMENT ON A FEDERAL PREEMPTION DEFENSE IN ORDER IMPERMISSIBLY TO APPLY STATE LAW IN AN AREA OF GRADE CROSSING SAFETY TO WHICH THIS COURT HAS HELD THAT FEDERAL LAW PREVAILS

Disregarding its own state precedents, the court below erected an evidentiary obstacle in order to thwart the assertion of a legal defense which derives from the U.S. Constitution and a federal statute. This decision of a state's highest court has the effect of elevating state policy over federal policy in

the important area of railroad safety. Thus, it is at odds with *Easterwood*, in which this Court, consistent with Congress' intent, established the primacy of federal policy, setting forth a straightforward test to determine when federal law preempts duties arising under state law to select and install adequate warning devices. 507 U.S. at 671. In *Shanklin,* this Court resolved a conflict that developed among state and federal courts subsequent to the *Easterwood* decision,[6] holding that the participation of federal funds in the installation of warning devices triggers preemption, and rejecting the ruling of some lower courts that additional facts must be shown.

This conflict is now being resurrected, as some state courts look for new ways to circumvent a federal policy with which they disagree. Such a practice has repeatedly been held by this Court to be impermissible [Petition at 18-19]. As it has in the past, this Court should review a decision of a state court that has disregarded the mandates of federal law. Failure to do so will have serious implications not just for petitioner, but for all railroads, as well as other defendants, seeking to assert, in state courts, federal rights or defenses in reliance on policies established by Congress and the federal agencies.

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[6] Compare *Ingram v. CSX Transp., Inc.*, 146 F.3d 858 (11th Cir. 1998); *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern, R.R.*, 68 F.3d 241 (8th Cir. 1995); *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 U.S. 815 (1996); *Union Pac. R.R. v. Sharp*, 952 S.W.2d 658 (Ark. 1997), all holding that under *Easterwood*, proof of federal funding of crossing warning devices triggers preemption, with *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994); *Norfolk Southern Ry. v. Shanklin*, 173 F.3d 386 (6th Cir. 1999), holding that proof of federal funding is not in itself sufficient to trigger preemption. Prior to *Easterwood*, four federal courts of appeals had established four different rules regarding preemption: *Hatfield v. Burlington N. R.R.*, 958 F.2d 320 (10th Cir. 1992); *CSX Transp., Inc. v. Easterwood*, 933 F.2d 1548 (11th Cir. 1991); *Karl v. Burlington N. R.R.*, 880 F.2d 68 (8th Cir.1989); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983).

A. The Ohio Supreme Court Improperly Reversed Summary Judgment For Petitioner In Disregard of Established Federal Law

The history of this case confirms that the decision below is not simply an instance of a state's highest court correcting an erroneous evidentiary ruling by a lower state court: instead, it is a glaring example of the misuse of state rules to defeat a federal policy which the state finds wanting. This case, which arose from a crossing accident, reached the summary judgment stage after this Court's decision in *Easterwood*, but prior to the *Shanklin* decision. Because the crossing at which the accident occurred was equipped with warning devices installed with federal funds, petitioner sought summary judgment, asserting a federal preemption defense to the claim that it had negligently failed to install adequate warning devices. Petitioner proffered the affidavit of Susan Kirkland, the manager of the Rail Safety Section of the Ohio Rail Development Commission (an agency within the Ohio Department of Transportation), as evidence of the participation of federal funds in the installation of the warning device at the crossing.

The trial court ultimately denied summary judgment on the authority of the decision of the Ohio Court of Appeals in *Gollihue v. Consolidated Rail Corp.*, 120 Ohio App. 3d 378, 697 N.E.2d 1109 (1997) [Petition at 30a]. Determining that *Easterwood* should be interpreted narrowly in order to preserve and maximize the role for state tort law, *Gollihue* had followed the Seventh Circuit's decision in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994),[7] in holding that federal funding did not trigger federal preemption of state law warning device adequacy claims in the absence of a showing that the Federal Highway Administration (FHWA) had

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[7] *Shots* had opined that the *Easterwood* decision need not be read "literally." 38 F.3d at 307.

approved, as adequate, the warning devices at the crossing. 120 Ohio App.3d at 396-97, 697 N.E.2d at 1120-21.

During the pendency of petitioner's appeal,[8] this Court decided *Shanklin*, rendering *Shots*, and any precedent that followed *Shots*, no longer good law. Recognizing that *Shanklin* was dispositive, the Ohio Court of Appeals properly held that petitioner was entitled to summary judgment on the warning device claim.[9] Although the Court of Appeals' decision was predictable and entirely unremarkable in light of *Shanklin*, the Ohio Supreme Court granted discretionary review. *Bonacorsi v. Wheeling & Lake Erie Ry.*, 91 Ohio St.3d 1483, 744 N.E.2d 1196 (2001).

Before the Ohio Supreme Court, respondent argued that *Shanklin* was distinguishable from this case. Respondent raised several non-existent or irrelevant distinctions, essentially making the very same arguments that were considered and rejected by this Court in *Shanklin*. For example, respondent insisted that this Court applied preemption in *Shanklin* because there had been a determination by a "diagnostic team that lights and gates were unnecessary at the crossing in issue," a fact not present in this case. Plaintiff-Appellant's Merits Brief at 20. This argument simply could not be squared with this Court's ruling in *Shanklin,* wherein, in response to plaintiff's assertion that no diagnostic team had analyzed the crossing,[10] it explained that: "[n]or does the[] applicability [of §646.214(b)(3)&(4)] depend on any individualized determination of adequacy by a diagnostic team or FHWA official." 529 U.S. at 356. Respondent made several

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[8] Respondent also had appealed, arguing that the trial court erred in refusing to allow the jury to consider punitive damages.

[9] The court further ruled that since it was evident the jury award had been based solely on the finding of inadequate warning devices, the court reversed the verdict and entered judgment for petitioner. Petition at 26a.

[10] Brief for Respondent at 16, 33, 36, *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000).

other arguments in urging reversal of the Court of Appeals' decision, including that petitioner had not shown that federal funds had been used to install the warning devices.

Faced with clear and controlling legal precedent supporting the Court of Appeals' decision, the Ohio Supreme Court announced a unique reading of Ohio evidence law, in disregard of its own precedents, to defeat petitioner's preemption defense. Without a single specific citation to the affidavit or deposition of Susan Kirkland, the Ohio Supreme Court found that she "clearly lacked the personal knowledge required [ ] to support the statements in her affidavit regarding federal funding." 95 Ohio St.3d at 320, 767 N.E.2d at 713-14. As a consequence of its decision to disregard the crucial evidence provided by Ms. Kirkland, the Ohio Supreme Court reversed the Court of Appeals' decision and reinstated the verdict for respondent. *Id.* at 321, 767 N.E.2d at 714.

The ruling below clearly was crafted to avoid the outcome mandated by *Shanklin*, as there could have been no witness more qualified or with greater knowledge on the issue of federal funding than Ms. Kirkland, who managed the Ohio Buckeye Crossing Program under which the warning devices had been installed. The dissent, which recounted in detail the contents of the Kirkland deposition, concluded that, with respect to the crossing program in question, Ms. Kirkland:

> was responsble for setting up the funds, reviewing the plans, and processing the bills for the crossbuck program. She attended meetings and helped set up the parameters and the procedures of the program. She helped draft an agreement between ODOT and [respondent] in which ODOT agreed to supply all new crossbuck signs at passive crossings and to reimburse [respondent] with federal funds for its installation costs.

95 Ohio St.3d at 323, 767 N.E.2d at 715-16 (Kline, J., dissenting). Citing to analogous Ohio cases (a component missing from the majority opinion), the dissent concluded that the witness "had personal knowledge to state in her

affidavit that federal funds were used to install crossbuck signs" at the crossing in question, and, consequently, that the Court of Appeals' determination on personal knowledge should have been upheld. *Id.*, 767 N.E.2d at 716.

Since the court below was without authority to alter the legal requirements for establishing a preemption defense set forth in *Easterwood* and *Shanklin*, at respondent's urging the court instead engaged in a fact-based inquiry, focusing on whether petitioner had established the relevant fact to support its preemption defense: the participation of federal funds in the installation of the warning device at the crossing where the accident occurred. The fact of participation of federal funds was demonstrated by the affidavit submitted by petitioner and Ms. Kirkland's deposition, and that fact was neither challenged nor controverted by any evidence submitted by respondent.

Instead of submitting evidence to the contrary, respondent argued that a heightened burden of proof be imposed on petitioner on the grounds that the preemption defense was inimical to the State's public policy because it would have the effect of depriving an injured motorist of the right to seek monetary damages under state law.[11] Respondent insisted that the court should demand proof beyond what is required by federal law, asserting that "it is not unreasonable to require that preemption be invoked only based on documentary proof

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[11] Plaintiff-Appellant's Merits Br. at 21. Respondent argued that this Court's precedents impose a heavy burden on a party seeking to establish preemption. It is true that the burden of establishing that Congress intended to preempt state law is on the party seeking to rely on preemption. However, with respect to the issue in this case that determination has been unequivocally made by *Easterwood*. And, there is no precedent to support the proposition that once Congress' intent to preempt is established, defendants also are to be held to a heightened evidentiary burden when attempting to prove the facts which are relevant to a preemption defense.

of the factual predicates as outlined in *Shanklin*." Plaintiff-Appellant's Merits Br. at 21.

There is, however, no requirement that the fact of federal funding may be established only by documentation. Thus, respondent invited the court below impermissibly to impose a special, more stringent evidentiary burden in this case in order to avoid the dictates of federal law. Although other courts have routinely acknowledged the fact of federal funding based on affidavits submitted by officials knowledgable about the relevant crossing project [Petition at 15], the court below accommodated respondent's demands.

B. The Ohio Supreme Court's Ruling Puts A Near Impossible Burden on Railroads to Assert a Defense Based on Federal Law and the Constitution and Thereby Frustrates Federal Policy

In essence, the court below has all but foreclosed the ability of railroads to assert a valid preemption defense to negligence claims brought in state court alleging inadequate warning devices. Given the close involvement of petitioner's witness in the implementation of the relevant crossing program, *see* 95 Ohio St.3d at 323, 767 N.E.2d at 715 (Kline, J., dissenting), it is hard to imagine ever proffering a witness with greater personal knowledge as to the source of funding of a grade crossing project. Ms. Kirkland was involved in all the key aspects of the project under which the crossing device was installed, except, as she acknowledged, the actual "handling" of the federal money.[12]

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[12] Rather than focus on the totality of her testimony, the court below simply noted that "Kirkland testified that ODOT was responsible for handling federal funds' and "that she did not work for ODOT . . ." 95 Ohio App.3d at 320, 767 N.E.2d at 713. Respondent had directed the court's attention to Kirkland's testimony that she did not write checks or make deposits. Plaintiff-Appellant's Merits Br. at 25-26, n.16] . In any event, the majority was mistaken in concluding that Ms. Kirkland was not

The majority's insistence on proof of "handling federal money" was based on a lack of understanding of the procedures involved in federally funded projects. This resulted in a near impossible burden of proof, inasmuch as the state pays the railroad for construction and other services with state funds and is then reimbursed with federal funds remitted by wire transfer directly to the state's account. [Petition at 21-22, n. 13] Thus, it is unlikely that testimony can ever be proffered by a state official who is knowledgeable about the implementation of crossing programs and who also has actually handled the receipt and deposit of federal funds.

If allowed to stand unreviewed, this case will serve as an open invitation to other states similarly to contrive evidentiary standards (or other rules) which not only deny railroads the right to assert a defense based on federal law, but which result in state policy preferences trumping Congress' policy choices for addressing crossing safety embodied in the Federal Grade Crossing Program. Prior to the Federal Program, the effectiveness of public policy in promoting crossing safety was called into question.[13] The Federal Program, which was established to address this problem, calls for a data-driven process for identifying and upgrading crossings, either with active or passive warning devices, on a prioritized basis. The Federal Program requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d).

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affiliated with ODOT. 95 Ohio St.3d at 323, n. 11, 767 N.E.2d at 716, n. 11 (Kline, J., dissenting)

[13] *See* U.S. Dept. of Transp., Report to Congress: *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* 34 (1972). As part of the FRSA, the Secretary of Transportation was required to study the problem of crossing safety and report back to Congress. 45 U.S.C. § 433(a).

The process by which the states identify crossings which are hazardous, and develop and prioritize safety improvement projects, is subject to regulations issued by the FHWA at 23 C.F.R. Part 924.[14] Other federal regulations (at 23 C.F.R. Part 646) establish standards of adequacy for crossing warning devices when federal funds are used for upgrades. As a result, "state and private decisionmaking authority is displaced," *Easterwood,* 507 U.S. at 670, and state law may not "impose an independent duty on a railroad to identify and/or repair dangerous crossings." *Id.* at 671.

In a civil lawsuit, a preemption defense invokes Congress' decision that on the issue of rail safety federal policy, as embodied in regulations issued by the Secretary of Transportation, prevails over state law. *See* 49 U.S.C. § 20106. Here, the state's policy preference, which would hold railroads legally liable for failing to take certain actions (retrospectively determined by a jury to be reasonable), presumes a different set of roles and obligations for railroads than does federal policy.[15] The court's application of ad hoc

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[14] These regulations require that implementation of federally-funded crossing projects be undertaken on the basis of relative hazard ranking (to ensure that the potentially more dangerous crossings are upgraded first and that federal money is used in a cost effective manner). 23 C.F.R. §§ 924.9; 924.11(a). As part of that ongoing process, railroads are to provide the state with data related to their train operations. *See* U.S. Dept. of Transp., *National Railroad-Highway Crossing Inventory Update Manual* C-3 (1976). After identifying a crossing as a candidate for possible upgrade, based on its survey, the state typically will convene a diagnostic team, which usually will include a representative of the railroad. As a result of a diagnostic review, a crossing may be placed on a state's schedule for upgrades, which must be submitted to the federal government for approval.

[15] During the process of revising the Manual on Uniform Traffic Control Devices, the Federal Highway Administration explained that "[t]he FHWA and the Federal Railroad Administration have reviewed Federal law, regulations and guidance and found that although they encourage voluntary railroad involvement (as members of diagnostic

requirements to effectuate the state's (presumed) preference for permitting damage suits to go forward is an outcome which this Court has steadfastly refused to permit, as being inconsistent with the Supremacy Clause of the United States Constitution.[16] This Court has consistently made it clear that state courts have an obligation to enforce federal law as if it were its own law, "[f]or the policy of the federal Act is the prevailing policy in every state." *Testa v. Katt*, 330 U.S. 386, 393 (1947); *Howlett ex rel Howlet v. Rose*, 496 U.S. 356, 371 (1990); *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934) ("A state may not discriminate against a right arising under federal law." *Id.* at 234).

This case falls squarely in the category of cases in which state courts have manipulated state rules to evade their obligation to enforce federal law. Under Ohio law, petitioner met its evidentiary burden of demonstrating that federal funds were used to install the warning devices at the Howe Road crossing through submission of the uncontradicted affidavit of a competent witness. After considering and rejecting respondent's objections to the affidavit, the Ohio Court of Appeals recognized that the evidence submitted was sufficient to establish that "federal funds were used to pay for the signs installed at the Howe Road crossing." [Petition at 26a] This proved the fact necessary to establish a preemption defense to respondent's claim. Once the party seeking summary judgment has proved a fact in accordance with the

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teams where federal funds are involved) in the analysis of need for and type of protection, they do not impose on railroads the responsibility to make, or share in making, determinations of need for or selection of traffic control devices." Federal Highway Administration, National Standards for Traffic Control Devices; Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), 65 Fed. Reg. 78923, 78947 (2000).

[16] U.S. Const., art VI, § 2. It is axiomatic that courts must enforce the rules established by Congress even if the court believes to do otherwise would better serve public policy. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997).

existing rules of evidence applicable to summary judgment motions, that fact must be assumed for the purpose of the motion regardless of its alleged impact on the state's policy. When summary judgment was properly granted by the Court of Appeals, it was impermissible for the state's highest court to "refuse to enforce the right arising from the law of the United States because of conceptions of impolicy or want of wisdom on the part of Congress in having called into play its lawful powers." *Testa*, 330 U.S. at 393; *See also Howlett*, 496 U.S. at 371. ("The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source."); *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211, 222 (1916).

C. The Decision Below Renders A Railroad's Obligations at Crossings Dependent Not On Federal Regulations But On The Venue Choices Made By Plaintiffs

In contrast to the Ohio Supreme Court's decision, a federal court in Ohio accepted an affidavit from the very same witness found by the court below to "lack[ ] . . . personal knowledge" on the issue of federal funding, *see Flood v. CSX Transp., Inc.,* No. C-2-99-1186 (S.D. Ohio, July 12, 2001). These incongruous outcomes underscore why allowing this case to go unreviewed would create an untenable situation. Permitting this case to stand would establish competing sets of railroad obligations with respect to federally funded crossing warning devices within the state of Ohio, depending solely on whether litigation arising from a crossing accident were pursued in state or federal court.[17] Congress' goal of uniformity with respect to rail safety cannot long survive in such an environment.

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[17] As petitioner points out, as a result of the *Johnson* decision, the same situation also now exists in Mississippi. [Petition at 15]

Moreover, the erosion of the primacy of federal policy choices, which respondent has sought successfully, can be hastened by forum shopping, to which crossing accident cases readily lend themselves. Plaintiff's will have every incentive to funnel crossing cases into state courts in the knowledge that claims which would be barred in federal court will likely be permitted to proceed in state court. Plaintiffs often are able to maintain an action in state court, even if diversity of citizenship exists between the plaintiff and the railroad, by employing the tactic of naming as a defendant a member of the crew who happens to be a citizen of the same state as plaintiff, even though there is no intention of ultimately pursuing damages against the crew member. Typically, the locomotive engineer is named as a defendant, though in some cases a track inspector or supervisor is named in order to avoid federal court. In cases of accidents involving Amtrak, the lawsuit often is brought against the railroad owning the track without naming Amtrak as a defendant, in order to avoid removal based on Amtrak's status.[18] These litigation tactics are utilized today[19] and will only be further encouraged if state courts that are hostile to preemption are given free reign to defeat preemption defenses through manipulation of state evidentiary rules. As a result, notwithstanding this Court's unequivocal holding in *Shanklin,* the goal of uniformity of federal railroad safety law will remain a chimera.

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[18] Federal jurisdiction exists in cases where Amtrak is a defendant. 28 U.S.C. §1349. *In re Rail Collision Near Chase Maryland,* 680 F.Supp. 728 (D. Md. 1987).

[19] *E.g., Illinois Cent. R.R., Bennett and Wright v. Winters,* 815 So.2d 1168 (Miss. 2002)(crewmembers Bennet and Wright named as defendants); *Strantz v. Pinion and Illinois Cent. R.R.,* 652 So.2d 738 (Miss. 1995) (crew member Pinion named as defendant); *Martin v. Illinois Cent. R.R. and Dew,* 648 So.2d 1165 (Miss. 1995) (crew member Dew named as defendant)

II. THE DECISION BELOW IS PREMISED ON A MISREADING OF *SHANKLIN* AND THE FEDERAL REGULATORY PROCESS FOR UPGRADING CROSSINGS

The error of the court below was compounded by its arbitrary adherence to a pre-*Shanklin* state court decision under which state law duties to select and install adequate warning devices are not preempted until federal funds "actually have been . . . spent." 95 Ohio St.3d at 320, 767 N.E.2d at 713 (citing *Carpenter v. Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994)). The focus of the court below on whether Ms. Kirkland actually handled federal money, *id.*, and whether the state actually "received money from the federal government," *id.* at 320, n.10, 767 N.E.2d at 714, n.10, shows that the court's analysis was informed by the erroneous standard set forth in *Carpenter.* Application of this standard—which conditions preemption on whether federal dollars have been disbursed to the state—not only is inconsistent with applicable federal law and this Court's holding in *Shanklin,*[20] it would leave railroads whose crossings are the subject of federally funded projects in an untenable position.

The test for preemption applied by the court below has the effect of continuing in force state law duties to select and install adequate warning devices well beyond a time when the railroad has any discretion whatsoever to act on those putative duties. Crossings that are upgraded pursuant to federally funded projects become subject to a process that must be carried out in accordance with federal regulations, and subject to federal oversight, at the project's outset, well

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[20] FHWA regulations and the *Easterwood* and *Shanklin* decisions make it clear that it is federal funds "participation"—not disbursement—that triggers preemption. *See* Petition at 20-22. The court below made no attempt to reconcile the *Carpenter* standard with the preemption standard set forth in *Shanklin.*

before the state is likely to have been reimbursed with federal money. When a crossing-improvement project is submitted for federal funding, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); *id.* 140.904(b). At this point, the role of the railroad is limited under the Federal Program, and any discretion to act independent of the Program vanishes once the process of upgrading a crossing has begun: thus, even if, in the railroad's judgment, different or additional warning devices are called for, it simply has no authority to carry out that judgment.

A series of federal regulations set forth a step by step process for crossing improvement projects, from project initiation to completion. *See e.g.,* 23 C.F.R. § 646.216(b)(1) (authorizing submission of preliminary engineering services and cost estimates by the railroad); *id.* § 646.216(d) and (e) (governing preparation of a contract, which must comply with certain federal requirements and be approved by the federal government, covering the installation of the devices). As the project moves forward, the state must authorize the acquisition of the traffic control devices and other materials. Once this is accomplished, upon FHWA authorization, the state will advise the railroad that it may proceed with construction. The final stage of the project is an on-site inspection by FHWA and the state. The railroad (or, in some cases, another contractor used to install the devices) is reimbursed, for services and materials in accordance with the terms of the contract, by the state, which in turn seeks reimbursement from the federal government. Obviously, the Secretary of Transportation does not begin to exercise authority over the project only at the time the federal funds are disbursed.

The prior decisions of this Court provide the analytical framework for determining the point during a Federal-aid

grade crossing improvement project when preemption of state law occurs. This Court's decisions focus on the shifting of authority over the crossing from the state (and state rules of law allocating responsibility) to the federal government. The transfer of decisionmaking authority over warning devices to the Secretary occurs "on any project where Federal-aid funds participate in the installation of the device." § 646.214(b)(3)(i).[21] Once the state makes a decision to install warning devices under the Federal Program–a decision that must be made pursuant to federal law and subject to the approval of the federal government–the railroad's role in installing warning devices is simply to fulfill its obligations under the contract. Leaving intact state law obligations beyond this time would conflict with the entire regulatory process for crossing improvements and leave the railroads subject to clashing legal regimes.

The lower court's ruling cannot be reconciled with either the federal regulatory scheme or this Court's reasoning in *Easterwood* and *Shanklin,* which are premised on the notion that the key event is the ceding of control over the crossing to federal authority. Grounded in the view that disbursement of federal money triggers preemption, the logical conclusion of the test applied by the court below would have regulations which cover the duty to *select* proper devices become applicable only after the devices have been selected and paid for, long after control over the project has shifted to the federal government.

Regardless of whether federal money has been disbursed to the state, that event is not what triggers the application of the preempting regulations. Thus, proof of "federal funds [ ] actually hav[ing] been . . . spent" is not, contrary to the

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[21] As petitioner points out, the test of preemption applied by the court below is in conflict with decisions of federal courts of appeals in *Hatfield v. Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995) and *Armijo v. Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996).

analysis of the court below, the test of preemption. Nonetheless, the court's contrary legal conclusion led it to seize on Ms. Kirkland's acknowledgement that she did not handle the federal money, and (subject to a strong dissent) to use that as a basis for overturning the court of appeals' proper decision granting summary judgment. In reality, of course, neither party was under the illusion that federal funds had not participated in the installation of the warning devices at the Howe Road crossing.[22] The court below, cloaking itself in such an illusion, combined a misreading of federal law with a misuse of state law. The result was a decision which challenges an Act of Congress and prior decisions of this Court, and therefore should be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted

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October 7, 2002

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[22] One of respondent's alternative arguments acknowledged that the warning devices had been installed with federal funds, but that the funds were from a source that did not trigger the preempting regulations.

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No. 02-362

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

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REPLY BRIEF OF PETITIONER

The Ohio Supreme Court in this case disregarded this Court's precedent in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), in order to deny the clearly applicable defense of federal pre-emption. To do so, the Ohio court applied its own rules in an unreasonable way to discriminate against federal law. This case presents a conflict with the decisions of this Court and the Tenth Circuit and warrants review because of the important issue of state evasion of federal pre-emption in rail safety.

1. Respondent strains to avoid these conclusions by misstating the facts and the record and by invoking inapplicable doctrines in an attempt to shield the judgment below from review. Those contentions can be quickly refuted.

First, Respondent devotes much of his opposition to rearguing the facts and claiming that there are alternative bases to support the jury verdict. Opp. 3. Such arguments are wholly irrelevant to this Court's review. The Ohio Court of Appeals held that "the judgment against appellant was based solely on appellee's inadequate signalization claim," Pet. App. 26a, and was therefore pre-empted under *Shanklin*. See Opp. 3 & n.3. The Ohio Supreme Court did not disturb the appellate court's ruling on the basis for the verdict, but rather reversed the pre-emption ruling. Pet. App. 11a, 8a-9a. It is the pre-emption ruling that is before this Court.

Second, Respondent's suggestion that Petitioner "abandoned" his federal pre-emption defense by not presenting additional evidence on federal funding at trial is nonsense. Opp. 5. The trial court acknowledged that "federal funds may have been used" on the crossing, but denied pre-emption based on a legal standard later rejected in *Shanklin*, ruling as a matter of law that there was no pre-emption if the Federal Highway Administration ("FHWA") did not specifically determine the adequacy of the device for that

crossing. Pet. App. 27a.[1] It is absurd to claim that Petitioner had a duty to present further evidence of federal funding at trial when the trial court had ruled that the pre-emption defense was legally precluded even if the devices were federally funded. In fact, far from finding the pre-emption argument abandoned, the Ohio Court of Appeals ruled in Petitioner's favor on pre-emption. *Id.* at 26a.

Third, Respondent misrepresents the statement by counsel at a pretrial hearing that Petitioner could not show that the dollars spent at the Howe Road crossing "'flowed from the federal government other than . . . by implication of everything that's here.'" Opp. 4. This was not an admission of lack of evidence, but an *explanation* of the federal funding system. The FHWA authorizes federal funding on a project basis. See 23 C.F.R. §§ 140.904, 646.216(e)(1). Federal funds are not allocated to a particular crossing. Here, as in every case where there is no federal line item for a particular crossing, Petitioner proved participation of federal funds in the installation of warning devices by showing that the state project was federally funded and that the devices at the crossing were part of that project. Specifically, Kirkland's testimony established federal funding of the Buckeye Crossbuck Program, and it was undisputed that the crossbuck at the Howe Road crossing was a part of that project.[2]

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[1] Contrary to Respondent's claim, Opp. 5 n.4, the trial court did deny the motion to strike Kirkland's affidavit as lacking personal knowledge. Under Ohio law, when a court does not rule on a motion, the motion is deemed denied. *State* v. *Delaney*, 458 N.E.2d 462, 464 (Ohio Ct. App. 1983); Pet. App. 15a n.12.

[2] Moreover, Petitioner performed the installation of the crossbuck pursuant to a contract with the State that provided that reimbursement would be from federal funds. Kirkland Aff. at 2. Respondent falsely suggests that the contract did not apply to this crossing because of a date discrepancy. Opp. 4-5. Susan Kirkland explained in her affidavit that the original contract date of 1993 was extended to 1995 because the State delayed in supplying the crossbuck signs. Kirkland Aff. at 2.

Finally, Respondent claims that the pre-emptive federal warning-device regulation of 23 C.F.R. § 646.214 would not apply because the Buckeye Crossbuck Program would be funded out of federal "experimental research" spending under 23 U.S.C. §§ 403 and 307 (repealed 1998). Opp. 6 & n.5; Pl.-Appellant's Merit Br. at 18-20, *Bonacorsi* v. *Wheeling & Lake Erie Ry.*, 767 N.E.2d 707 (Ohio 2002) (No. 00-2278). That claim is frivolous and was rejected in *Flood* v. *CSX Transportation, Inc.*, No. C-2-99-1186 (S.D. Ohio July 12, 2001). *Flood* held that pre-emption had occurred in the installation of a Buckeye Crossbuck Program sign and that Respondent's argument was flatly inconsistent with the plain language of the regulation and with *Shanklin* because (1) pre-emption occurs whenever 23 C.F.R. § 646.214 is applicable, *Shanklin*, 529 U.S. at 353; (2) this Court held that the regulation by its plain terms applies to "'*any* project where Federal-aid funds participate in the installation of the devices,'" *id.* at 356; (3) the regulations specifically state that their provisions apply regardless of the source of federal funds, Pet. App. 61a-62a; and (4) Respondent's claim that the regulation cannot apply when warning devices are installed "without consideration of specific crossing conditions," Opp. 6 n.5, was directly rejected in *Shanklin*, 529 U.S. at 356. See Pet. App. 61a-63a.[3]

In fact, Respondent's argument about the separate federal funding of an "experimental" program like the Buckeye Crossbuck Program shows that the ruling below was a contrivance. Neither the court below nor the plaintiff could dispute in good faith that this project was federally funded, and that federal funds participated in the installation of the crossbuck at Howe Road. (Indeed, in *Flood* the plaintiff,

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[3] The FHWA has proposed acceptance of the standard crossbuck modifications made in the Buckeye Crossbuck Program. *See* National Standards for Traffic Control Devices: Manual on Uniform Traffic Control Devices for Streets and Highways, 67 Fed. Reg. 35,850, 35,881 (proposed May 21, 2002) (to be codified at 23 C.F.R. pt. 655).

represented by Respondent's counsel, conceded that the Buckeye Crossbuck Program was federally funded based on Kirkland's testimony, see Pet. App. 61a.).[4] There is no doubt that the state official who managed the State's crossing safety programs and oversaw the Buckeye Crossing Program, Pet. App. 14a-15a, had personal knowledge that the Program was federally funded. The court below simply distorted state rules in an effort to defeat the pre-emption of state law in this case.

2. Respondent claims that the decision below presents no federal question, and that the state "personal knowledge" rule is an independent and adequate state ground for decision. Opp. 12-13.[5] But this Court has long ruled that invocation of state evidentiary rules to deny a federal right presents a federal question, for a "federal right cannot be defeated by the forms of local practice." *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 296 (1949); *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943).

Moreover, the "adequate and independent state ground" alleged by Respondent is neither adequate nor independent. The ruling rejecting pre-emption was not based on an independent state law ground; it was an inquiry that turned on the standards of the federal defense. See *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983) (where state and federal law are interwoven, the adequate and independent state law doctrine does not apply). In fact, the state court employed an incorrect standard, ignoring the test for pre-emption articulated by this Court in favor of a pre-*Shanklin* test enunciated in the Ohio case *Carpenter* v. *Consolidated Rail Corp.*, 631 N.E.2d 607, 610 (Ohio 1994). See *infra* at 7-10.[6]

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[4] Respondent's statement that Kirkland was not deposed in *Flood* is incorrect, Opp. 10 n.8; she was deposed on January 4, 2001.

[5] Respondent's statement that the petition for certiorari in *Duncan* v. *Kansas City Southern Railway*, 773 So. 2d 670 (La. 2000), *cert. dismissed* 532 U.S. 992 (2001) (No. 00-1396), presented a similar question is false. The petition, filed by the plaintiff, concerned the amount of damages.

[6] Respondent relies on cases that are irrelevant. *See Israel* v. *McMorris*, 455 U.S. 967 (1982) (denial of certiorari in a habeas corpus

A state procedural rule can also never be an "adequate" ground when it is used unreasonably to burden or discriminate against a federal right, as the Ohio court did here. This Court has repeatedly reviewed both the unreasonable application of an otherwise neutral state law rule that burdens a federal right and the discriminatory application of state law to deny a federal right. See Pet. 16-19.

The Ohio Supreme Court's application of its rules to reject Kirkland's testimony of personal knowledge of federal funding was patently unreasonable. Under Ohio law, a statement of personal knowledge is sufficient unless there is contrary evidence. *State ex rel. Corrigan* v. *Seminatore*, 423 N.E.2d 105, 111 (Ohio 1981). There was no contrary evidence in this case. To overcome his failure to provide such evidence, Respondent attempts to contrive a contradiction in Kirkland's own testimony. Kirkland stated in her affidavit that she had personal knowledge of federal funding for the project. Kirkland Aff. at 1. She explained in her deposition that she was involved in the planning process with the FHWA; she set up the funds; and she processed bills for grade crossing projects. Kirkland Dep. at 13, 26, 33. Respondent then asked Kirkland whether she did "personally transfer or receive any funds" for the program, or if those tasks would have been performed by others. Kirkland stated that she did not do the transfers, but would have known about them from others. *Id.* at 14-15. Respondent and the court below distorted this statement to construct a contradiction, alleging that she failed to show personal knowledge of federal funding because she did not personally handle the deposits.

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case involving a refusal to stipulate to the admissibility of polygraph evidence); *Griffin* v. *United States*, 336 U.S. 704 (1949) (remanding a case to a local court to formulate an evidentiary rule because there was no federal rule on the particular question). *Duncan* v. *Tennessee*, 405 U.S. 127 (1972) (per curiam), dismissing certiorari in a double jeopardy case turning on a state rule of pleading, preceded *Michigan* v. *Long*, 463 U.S. 1032 (1983), which explained that where federal and state rights are interwoven, this Court may review the decision below.

Opp. 8 n.7. However, the fact that others actually handled federal deposits does not refute Kirkland's testimony that she had personal knowledge that the Buckeye Crossbuck Program was federally funded. Prior Ohio precedent clearly holds that personal knowledge is established if a person's job duties would place him or her in a position to learn the information from coworkers. Pet. App. 13a-15a.[7] As the manager of the State's federally funded crossing safety programs, under settled Ohio precedent Kirkland would be deemed to know whether the programs she managed were federally funded. Here, Kirkland was directly involved in setting up and managing the Buckeye Crossbuck Program. Pet. 10. With no evidence contradicting Kirkland's testimony of personal knowledge, under Ohio law as previously applied, her personal knowledge was established.[8]

Respondent's attempt to construct an inconsistency in Kirkland's testimony is flawed for a second reason: the alleged contradiction involves the wrong standard of pre-emption. Respondent argues that Kirkland's deposition revealed a lack of personal "knowledge *of the receipt of* federal funding for the project." Opp. 8 n.7 (emphasis added); Pet. App. 6a, 10a. It is federal funds participation, not receipt, that is the standard for pre-emption. Thus even if

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[7] Respondent and the Ohio court state that Kirkland did not work at the Ohio Department of Transportation ("ODOT"), and therefore she could not have knowledge of funds paid to ODOT. Opp. 9; Pet. App. 10a. This is misleading: Kirkland worked at the Ohio Rail Commission ("ORC"), an independent agency "within" ODOT. Ohio Rev. Code § 4981.02(A). Kirkland testified that the ORC administered federal crossing programs but the funds "flow[ed] into" ODOT. Kirkland Dep. at 7.

[8] The cases Respondent cites are distinguishable, either because the affiants did not state they had personal knowledge, *see State ex rel. Bd. of Comm'rs* v. *Tablack*, 714 N.E.2d 917, 920 (Ohio 1999) (per curiam); *State ex rel. Cassels* v. *Dayton City Sch. Dist. Bd. of Educ.*, 631 N.E.2d 150, 155 (Ohio 1994), or because there was a genuine issue of fact. *See Turner* v. *Turner*, 617 N.E.2d 1123, 1126-27 (Ohio 1993) (affiant stated in an affidavit that she had to brake to avoid a collision, while in a deposition, she stated that she might not have had a collision if she did not brake).

Respondent had shown an inconsistency in Kirkland's testimony, it would be immaterial to the issue of pre-emption.

Aside from the fact that it is the participation, rather than receipt, of federal funds that is the predicate for pre-emption, the Ohio court's requirement that federal funding can only be established with documentation of payment receipts or the testimony of an accountant who actually handled the deposit is absurd and is never applied in analogous contexts. In Title IX actions based on discrimination in federally funded educational programs, for instance, a plaintiff need not produce federal funds receipts and an accountant who deposited the funds during the entire period in question to establish that a program was federally funded. Courts have never adopted such evidentiary hurdles, which would severely limit federally created rights. See, *e.g.*, *Horner* v. *Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 272 (6th Cir. 1994) (Title IX case relying on statutory authority over federal funds to determine federal funding of Board of Education). Moreover, under the Ohio Supreme Court's new rule, the CEO of a defense contractor would be incompetent to testify that his company received federal funds if he did not personally handle the check.

The Ohio Supreme Court thus applied an unreasonable interpretation of a state evidentiary rule to defeat a federal right, and in doing so blatantly departed from Ohio precedent. The only logical inference is that the court below acted out of hostility toward federal pre-emption of state tort law. This Court has never permitted such discriminatory application of state rules to undermine federal law, nor should it do so here.

3. Respondent struggles to deny the conflicts between the Ohio Supreme Court and this Court, as well as the Tenth Circuit. Respondent attempts to show that *Easterwood* and *Shanklin* refute Petitioner's position by mischaracterizing that position as arguing that "a mere commitment to fund" a project suffices to establish federal funds participation and pre-emption. Opp. 16. To the contrary, Petitioner argues that

the proper interpretation of when "Federal-aid funds participate in the installation of the devices," 23 C.F.R. § 646.214(b)(3)(i), is that adopted by this Court in *Shanklin*: pre-emption occurs "[w]hen the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds." 529 U.S. at 357. Here, there is no dispute that Kirkland had personal knowledge that the FHWA had approved the Buckeye Crossbuck Program, and there is no dispute that the crossbuck at Howe Road was installed as part of that program and was operating at the time of the accident. To deny Petitioner's pre-emption defense, the Ohio Supreme Court impermissibly disregarded the *Shanklin* "participation" standard and instead invoked its pre-*Shanklin* decision in *Carpenter* to declare the conflicting rule that pre-emption occurs only upon proof of the actual receipt of federal funds. Pet. App. 10a.

Moreover, there is no discordance between the *Shanklin* standard advanced by Petitioner and *Easterwood* (as indeed the Tenth Circuit has ruled, *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 562 (10th Cir. 1995)). In *Easterwood*, this Court stated that when there was no installation of a warning device, there could be no federal funds participation in that installation and therefore no pre-emption. *Easterwood*, 507 U.S. at 673. The authorized grade crossing improvement project at issue in *Easterwood* was "shelved," *id.* at 672, and the federally mandated warning devices were never installed at the crossing in question.[9] By contrast, the crossbuck was installed at Howe Road as part of the Buckeye Crossbuck Program, and thus pre-emption incontrovertibly occurred under *Easterwood* and *Shanklin*.

The Ohio Supreme Court's adoption of a rule that contradicts the plain meaning of the regulation and

[9] Motion sensors had been installed at various locations, but these sensors were not warning devices under the regulations. In addition, the costs of the motion sensors were not allocated to the crossing in question, precluding a finding of "participation" at the crossing. 507 U.S. at 672.

Easterwood and *Shanklin* also places it in square conflict with the Tenth Circuit, which does not equate federal funds participation with actual disbursement. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (holding that that "federal participation began, and [state] law was preempted, no later than January 25, 1983. On that date, the Secretary of Transportation agreed to provide ninety percent of the funds required to install reflectorized crossbucks . . . ."). Respondent remarkably tries to erase the conflict by invoking the rule of *Hatfield*, that the federal government must "expend[] significant federal resources" on the project after FHWA authorization, 64 F.3d at 562. Opp. 18 (noting that *Armijo* requires actual expenditure in line with *Hatfield*). But neither the *Hatfield* nor *Armijo* courts held that "expenditure" occurs only when there is a disbursement of federal funds to the state highway agency. To the contrary, *Hatfield* specifically held that the requisite expenditure of federal resources (*i.e.*, participation of federal funds) occurred when the state agency "conducted an on-site inspection, including preliminary engineering, at a cost of $619.17 in federal funds." 64 F.3d at 561. The performance of work that the FHWA is obligated to fund – the incurrence of "a federally *reimbursable* cost of $619.17," *id.* at 560 (emphasis added) – constituted an "actual expenditure of federal resources . . . specifically directed toward the ultimate installation of the improved warning devices at th[e] crossing." *Id.* at 562. Expenditure in the Tenth Circuit (and in other cases cited by Respondent) does not mean disbursement of funds, which in *Hatfield* did not occur until six years after pre-emption was found to occur. *Id.* at 560, 562; see FHWA, *Financing Federal-Aid Highways* 16 (1999) ("Obligated funds are considered 'used' even though no cash is transferred."). Here, Kirkland testified from uncontroverted personal knowledge that the FHWA approved federal funding for the Buckeye Crossbuck Program, and it was undisputed that federally reimbursable work was performed under this project at Howe Road. Those

uncontroverted facts were sufficient to prove pre-emption under the rule of *Shanklin* and the Tenth Circuit. The Ohio Supreme Court's denial of pre-emption is in square conflict with those decisions.

Respondent cites a number of cases (including *Shanklin*, *Hatfield*, and *Armijo*) where there was evidence of the *receipt* of federal funds. Petitioner does not dispute that such evidence may be probative of federal funds participation in the installation of the warning devices. But those cases do not hold (as the Ohio Supreme Court did) that pre-emption *cannot* be proven if evidence of the receipt of federal funds is absent or unavailable in a particular case. Indeed, one of the cases cited by Respondent expressly disclaimed receipt as a standard for pre-emption because the court could not determine whether the federal funds received went to the crossing in question, given the difficulty of matching receipts and bills of different amounts and time periods. *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999) ("Preemption occurs when all warning devices for which federal payment *is to be made* have been installed and are operating.") (emphasis added).

Petitioner unequivocally proved the participation of federal funds in the installation of devices at Howe Road under the appropriate standard. The court below imposed an undue and discriminatory burden on the assertion of federal rights that is unprecedented under state law, and employed a standard for federal pre-emption that is in contravention of the rule of this Court and other federal courts of appeals. This Court should grant certiorari in this case to review a question of national importance and to uphold the express congressional goal of national uniformity in matters of railroad safety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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